DOCKET

No. 87-82-ADX
Status: GRANTED

Title: Federal Deposit Insurance Corporation, Appellant
v.
James E. Mallen, et al.

Docketed:
July 9, 1987

Court: United States District Court
for the Northern District Iowa

Counsel for appellant: Solicitor General

Counsel for appellee: McCarthy,James P., Siegrist,David J., Curtin,Mary E.

NOTE* Notice of Appeal filed 3/11/87 Ext. of time filed 5/4/87 until 6/9/87 by Blackmun, J., cited 5/30/87 further ext until 7/9/87 by Blackmun, J., cited

Entry	Date	Note	Proceedings and Orders
1	Apr 30 1987		Application for extension of time to docket appeal and order granting same until June 9, 1987 (Blackmun, May 4, 1987).
2	May 29 1987		Application for further extension of time to docket appeal and order granting same until July 9, 1987 (Blackmun, May,30, 1987).
3	Jul 9 1987	G	Statement as to jurisdiction filed.
5	Jul 27 1987		Order extending time to file response to jurisdictional statement until September 25, 1987.
6	Sep 25 1987		Motion of appellee to dismiss filed.
7	Sep 29 1987		DISTRIBUTED. October 16, 1987
8	Sep 29 1987		REDISTRIBUTED. October 16, 1987
9	Oct 5 1987	X	Reply brief of appellant FDIC filed.
10	Oct 19 1987		PROBABLE JURISDICTION NOTED.
			**********
12	Nov 18 1987		Order extending time to file brief of appellant on the merits until December 17, 1987.
13	Dec 15 1987		Record filed.
		*	Certified original record received.
14	Dec 17 1987		Joint appendix filed.
15	Dec 17 1987		Brief of appellant FDIC filed.
16	Dec 22 1987	G	Motion of appellee James E. Mallen for leave to proceed further herein in forma pauperis filed.
17	Jan 4 1988		DISTRIBUTED. Jan. 8, 1988. (Motion of appellee James Mallen for leave to proceed in forma pauperis).
18	Jan 11 1988		Motion of appellee James E. Mallen for leave to proceed further herein in forma pauperis GRANTED.
19	Jan 20 1988	G	Motion of appellee James Mallen for appointment of counsel filed.
22	Jan 20 1988		Brief of appellee James E. Mallen filed.
21	Jan 27 1988		DISTRIBUTED. Februry 19, 1988. (Motion of appellee James E. Mallen for appointment of counsel).
25	Feb 5 1988		SET FOR ARGUMENT, Tuesday, March 22, 1988. (1st case).
23	Feb 8 1988		CIRCULATED.
27	Feb 19 1988	X	Reply brief of appellant FDIC filed.
26	Feb 22 1988		Motion for appointment of counsel GRANTED and it is

No. 87-82-ADX

Entry	Date	Note	Proceedings and Orders
			ordered that Mary E. Curtin, Esq., of Minneapolis, Minnesota, is appointed to serve as counsel for the appellee James Mallen in this case.
28	Mar 22 1988		ARGUED.

JURISDICTIONAL

STATEMENT

No. 87-82

Supreme Court, U.S.
FILED
JUL 8 1987
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1987

FEDERAL DEPOSIT INSURANCE CORPORATION, APPELLANT

v.

JAMES E. MALLEN, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF IOWA

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

1. Whether 12 U.S.C. 1818(g), which provides that, whenever any director or officer of a federally insured bank has been indicted for a crime involving dishonesty or breach of trust that is punishable by imprisonment for more than one year, the appropriate federal banking agency may suspend such person from office if his continued service may pose a threat to the interests of the bank's depositors or to public confidence in the bank, is invalid under the Due Process Clause of the Fifth Amendment because it allows the agency a maximum of 30 days after receipt of a request to conduct a hearing and a maximum of 60 days after the hearing to issue a written decision whether the suspension order will be continued, terminated or modified.

2. Whether 12 U.S.C. 1818(g) is invalid under the Due Process Clause because it gives the agency discretion as to whether to receive oral testimony at such a hearing.

PARTIES TO THE PROCEEDING

There is one party in addition to those named in the caption: Appellee, Farmers State Bank of Kanawha, Iowa.

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In the Supreme Court of the United States

OCTOBER TERM, 1987

No.

FEDERAL DEPOSIT INSURANCE CORPORATION, APPELLANT

v.

JAMES E. MALLEN, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF IOWA

JURISDICTIONAL STATEMENT

OPINIONS BELOW

The decision of the district court concluding that Section 1818(g) is unconstitutional, declaring the Notice and Order of Suspension null and void, and enjoining appellant from enforcing it against appellee Mallen (App., *infra*, 1a-18a) is not yet reported. The district court's decisions denying appellant's motion for an amendment of the judgment (App., *infra*, 19a-23a) and denying appellant's motion for a stay pending appeal (App., *infra*, 24a-26a) are also not yet reported.

JURISDICTION

The order of the district court declaring the Notice and Order of Suspension null and void and enjoining appellant from enforcing it against appellee Mallen (App., *infra*, 18a) was entered on February 17, 1987. A notice of appeal to this Court (App., *infra*, 33a-34a) was filed on March 11, 1987. On May 4, 1987, Justice Blackmun extended the time within which to docket this appeal to and including

June 9, 1987; on May 30, 1987, Justice Blackmun further extended the time to and including July 9, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1252.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment provides in pertinent part:

> nor shall any person * * * be deprived of life, liberty, or property without due process of law * * *.

Section 1818 provides in pertinent part:

> (g) Suspension or removal of director or officer charged with felony
>
> (1) Whenever any director or officer of an insured bank, or other person participating in the conduct of the affairs of such bank, is charged in any information, indictment, or complaint authorized by a United States attorney, with the commission of or participation in a crime involving dishonesty or breach of trust which is punishable by imprisonment for a term exceeding one year under State or Federal law, the appropriate Federal banking agency may, if continued service or participation by the individual may pose a threat to the interests of the bank's depositors or may threaten to impair public confidence in the bank, by written notice served upon such director, officer, or other person, suspend him from office or prohibit him from further participation in any manner in the conduct of the affairs of the bank. A copy of such notice shall also be served upon the bank. Such suspension or prohibition shall remain in effect until such information, indictment, or complaint is finally disposed of or until terminated by the agency. In the event that a judgment of conviction with respect to such crime is entered against such director, officer, or other person, and at such time as such judgment is

> not subject to further appellate review, the agency may, if continued service or participation by the individual may pose a threat to the interests of the bank's depositors or may threaten to impair public confidence in the bank, issue and serve upon such director, officer, or other person an order removing him from office or prohibiting him from further participation in any manner in the conduct of the affairs of the bank except with the consent of the appropriate agency. A copy of such order shall also be served upon such bank, whereupon such director or officer shall cease to be a director or officer of such bank. A finding of not guilty or other disposition of the charge shall not preclude the agency from thereafter instituting proceedings to remove such director, officer, or other person from office or to prohibit further participation in bank affairs, pursuant to paragraph (1), (2), (3), or (4) of subsection (e) of this section. Any notice of suspension or order of removal issued under this paragraph shall remain effective and outstanding until the completion of any hearing or appeal authorized under paragraph (3) hereof unless terminated by the agency.
>
> * * * * *
>
> (3) Within thirty days from service of any notice of suspension or order of removal issued pursuant to paragraph (1) of this subsection, the director, officer, or other person concerned may request in writing an opportunity to appear before the agency to show that the continued service to or participation in the conduct of the affairs of the bank by such individual does not, or is not likely to, pose a threat to the interests of the bank's depositors or threaten to impair public confidence in the bank. Upon receipt of any such request, the appropriate Federal banking agency shall fix a time (not more than thirty days after receipt of

such request, unless extended at the request of the concerned director, officer, or other person) and place at which the director, officer, or other person may appear, personally or through counsel, before one or more members of the agency or designated employees of the agency to submit written materials (or, at the discretion of the agency, oral testimony) and oral argument. Within sixty days of such hearing, the agency shall notify the director, officer, or other person whether the suspension or prohibition from participation in any manner in the affairs of the bank will be continued, terminated, or otherwise modified, or whether the order removing said director, officer or other person from office or prohibiting such individual from further participation in any manner in the conduct of the affairs of the bank will be rescinded or otherwise modified. Such notification shall contain a statement of the basis for the agency's decision, if adverse to the director, officer or other person. The Federal banking agencies are authorized to prescribe such rules as may be necessary to effectuate the purposes of this subsection.

STATEMENT

1. Appellee Mallen is the President and a director of appellee Farmers State Bank of Kanawha, Iowa (App., *infra*, 2a). He is also the largest stockholder in Kanawha Investment Holding Company, a bank holding company that owns 92% of the stock of the bank (*id.* at 8a). On December 10, 1986, a federal grand jury in the Northern District of Iowa returned a two-count indictment against Mallen. Count 1 charged Mallen with making false statements in a personal financial statement for the purpose of influencing the actions of appellant Federal Deposit Insurance Corporation (the FDIC), in violation of 18 U.S.C. 1014, a charge that carries a penalty of up to two years in prison. Count 2 charged Mallen with making

false statements to the FDIC in violation of 18 U.S.C. 1001, a charge that carries a penalty of up to five years in prison. App., *infra*, 2a.

Section 1818(g) authorizes the appropriate federal banking agency—in the case of Farmers State Bank, the FDIC—to issue a written notice suspending a bank officer or director from office, or prohibiting him from further participation in the conduct of the affairs of the bank, if he has been indicted for a crime involving dishonesty or breach of trust that carries a penalty of imprisonment for more than one year, if his continued service may pose a threat to the interests of depositors or may threaten to impair public confidence in the bank. If a judgment of conviction of such a crime is entered, Section 1818(g) authorizes the appropriate federal banking agency to remove the officer or director from office.

Section 1818(g)(3) sets forth procedures applicable to suspensions from office, prohibitions from participation in the conduct of a bank's affairs, and removals from office. An officer subject to a suspension or prohibition has the right, within 30 days after receiving a notice of suspension or prohibition, to request "an opportunity to appear before the agency to show that the continued service to or participation in the conduct of the affairs of the bank by such individual does not, or is not likely to, pose a threat to the interests of the bank's depositors or threaten to impair public confidence in the bank." The agency is required to hold such a hearing within 30 days after receipt of such a request. At the hearing, the suspended officer or director may "submit written materials (or, at the discretion of the agency, oral testimony) and oral argument." The FDIC has by rule delegated the authority to decide whether to receive oral testimony to the hearing officer (12 C.F.R. 308.61(e)). The agency is required to notify the suspended officer, within sixty days after the hearing, whether the suspension or prohibition will be continued,

terminated or otherwise modified. If the decision is adverse to the officer, the agency is required to provide a statement of the basis for the agency's decision.[1]

On January 26, 1987, the FDIC served on Mallen, with a copy to the bank, a Notice and Order of Suspension stating that he was suspended, effective immediately, from his positions as President and a director of the bank and prohibited from participation in the conduct of the affairs of the bank (App., *infra*, 27a). One effect of the prohibition on participation in the bank's affairs was to prevent Mallen from voting his stock in the holding company (*id.* at 2a-3a). The notice explained that Mallen had been thus suspended and prohibited because (1) he had been charged in an indictment, filed by the United States Attorney in the United States District Court for the Northern District of Iowa, with the commission of or participation in crimes involving dishonesty or breach of trust punishable by imprisonment for a term exceeding one year, and (2) it appeared that continued service or participation by Mallen in the affairs of the bank might pose a threat to the interests of the bank's depositors or threaten to impair public confidence in the bank (*id.* at 27a).

The notice of suspension informed Mallen that he had the right, within thirty days of receipt of the notice, to request in writing an opportunity to appear before the FDIC

[1] The statute thus allows a maximum of 90 days to elapse between the request for a hearing and the agency's decision. The FDIC has provided by rule that, at the request of either the officer or the staff of the FDIC's Office of General Counsel, the record shall remain open for five days after the hearing for the parties to make additional submissions (12 C.F.R. 308.61(g)). The regulations provide, however, in accordance with the statute, that the FDIC is to make its decision "[w]ithin 60 days following the hearing or receipt of written submissions" (12 C.F.R. 308.62). Thus, the period during which the record may be kept open does not extend the 90-day period allowed by the statute. The district court, which referred to "95 days" (see App., *infra*, 4a) appears to have misunderstood this point.

in order to show that his continued participation in the bank's affairs would not threaten the interests of depositors or public confidence in the bank. The notice stated that the FDIC would schedule a hearing to be held within 30 days of its receipt of his request and that the hearing would be conducted in the manner prescribed in 12 U.S.C. 1818(g)(3). App., *infra*, 27a-28a.

By letter dated Friday, January 30, 1987, Mallen's counsel informed the FDIC that Mallen requested an immediate hearing under the statute, with the opportunity to present oral testimony as well as written evidence (App., *infra*, 4a). The FDIC scheduled the hearing for February 18, nineteen days after the date shown on the request (*ibid.*). The FDIC's regional counsel "initially took the position that the hearing should simply be oral argument on written submissions" (*ibid.*),[2] but it never became

[2] Another subsection, 12 U.S.C. 1818(e), sets forth a procedure by which the appropriate federal banking agency may remove or suspend any director or officer of an insured bank who, in the opinion of the agency, has engaged in specified misconduct that, in the agency's judgment, has injured or may injure the bank or the interests of its depositors. Removal is effective after notice and a hearing (12 U.S.C. 1818(e)(5)). Where an individual's conduct is deemed to pose an immediate danger, he may be suspended pending the removal proceeding (12 U.S.C. 1818(e)(4)). Suspension is effective immediately upon written notice and continues through the removal proceeding, unless stayed by a court as provided in the statute (see 12 U.S.C. 1818(e)(4) and (f)).

In late 1986 (before Mallen was indicted), the FDIC had conducted a two-week administrative hearing to determine whether to remove Mallen pursuant to Section 1818(e)(5) on account of his activities at the bank. No result was reached because the administrative law judge in that proceeding recused himself before ruling. See App., *infra*, 3a n.1. The Regional Counsel's position that oral evidence should be dispensed with in the present case was set forth in a letter dated February 2, 1987, to the Executive Secretary of the FDIC and to Mallen's counsel (attached to complaint) and was based in part on the fact that the record of that recent adversarial proceeding, which produced 1400 pages of sworn testimony, was available.

"clear whether oral evidence would be permitted, since denying permission to present oral evidence is in the discretion of the hearing officer" (*ibid.*).

On February 6, Mallen brought this action in the United States District Court for the Northern District of Iowa, asking that Section 1818(g) be declared invalid and that the FDIC be enjoined from enforcing the notice of suspension and prohibition against him (App., *infra*, 1a-2a). Mallen argued that the suspension and prohibition deprived him of liberty and property within the meaning of the Fifth Amendment. He claimed that the post-suspension hearing provided for in the statute was inadequate under the Due Process Clause because (1) the delay permitted between his request for a hearing and final decision by the FDIC was excessive and (2) the hearing officer was authorized, in his discretion, to dispense with oral testimony. Mallen also argued that the statute was unconstitutional because it does not provide for judicial review of the FDIC's ultimate decision to continue, modify or terminate the suspension.[3] Mallen sought a temporary restraining order, a preliminary injunction and a permanent injunction. *Id.* at 6a. The FDIC responded that the statute afforded Mallen due process.[4]

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[3] The court did not reach this question. 12 U.S.C. 1818(i) provides that "except as otherwise provided in this section no court shall have jurisdiction to * * * review, modify, suspend, terminate or set aside any such notice or order." The FDIC took the position that this provision does preclude judicial review of notices of suspension under Section 1818(g) and that it is constitutional to do so.

Mallen also alleged that Section 1818(g) violates the Due Process Clause of the Fifth Amendment "because it discriminates against those indicted for federal offenses, but not similar state law offenses." Complaint 7. The district court never ruled on this count. The statute refers to violations of "State or Federal law" (12 U.S.C. 1818(g)(1)).

[4] The FDIC also contended that the district court lacked jurisdiction over the case because 12 U.S.C. 1818(i)(1) provides that "except as otherwise provided in this section no court shall have jurisdiction

2. On February 17, 1987, the district court enjoined the FDIC from enforcing the notice of suspension and prohibition.[5] The district court determined (App., *infra*, 17a) that it had jurisdiction to decide the constitutional issue under 28 U.S.C. 1331. The court then concluded that both Mallen and the bank had property interests in Mallen's continued employment and participation in the bank's affairs (App., *infra*, 9a). Citing this Court's formulation in *Mathews* v. *Eldridge*, 424 U.S. 319, 333 (1976), that due process requires "[an] opportunity to be heard at a meaningful time and in an meaningful manner," the district court next inquired whether it was permissible to suspend Mallen with no pre-suspension hearing (App., *infra*, 9a). The court decided, citing *Mackey* v. *Montrym*,

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to affect by injunction or otherwise the issuance or enforcement of any notice or order under this section, or to review, modify, suspend, terminate or set aside any such notice or order." There is no provision elsewhere in Section 1818 for judicial review of notices and orders under Section 1818(g). The district court understood, however, that it was "not contended that the Court has no jurisdiction to review the constitutionality of the statutory scheme," and found that it had jurisdiction under 28 U.S.C. 1331 (App., *infra*, 17a). We do not argue that Section 1818(i) deprives federal courts of jurisdiction to consider the constitutionality of Section 1818(g). Cf. *Johnson* v. *Robison*, 415 U.S. 361, 366-367 (1974).

[5] The district court did not make clear whether its injunction was preliminary or permanent. On the one hand, it explained (App., *infra*, 1a) that it was ruling on the motion for a preliminary injunction, recited the standard for granting preliminary relief (*id.* at 7a-8a) and later described its ruling as "based only on the record that had been made to the date of the preliminary injunction hearing" (*id.* at 19a n.1). On the other hand, the bulk of the court's discussion was on the merits of the claim, no further hearing was set and the Order was permanent in form (*id.* at 18a). Especially in light of the district court's subsequent refusal to modify its order, we understand it to have issued a permanent injunction. The injunction is appealable to this Court in any event (see 28 U.S.C. 1252).

443 U.S. 1 (1979), that the Constitution does not mandate a pre-suspension hearing because "in cases such as this there generally is a compelling [governmental] interest in a summary adjudication" (App., *infra*, 10a).

The court ruled, however, that the time periods set forth in Section 1818(g)(3) deprived appellees of a meaningful hearing. The court found the situation analogous to that in *Barry* v. *Barchi*, 443 U.S. 55 (1979), in which this Court invalidated the New York State Racing Commission's procedures for summary suspension of horse trainers whose horses tested positive for drugs. In *Barry*, the Court noted that while Barry had been suspended for fifteen days, the Racing Commission's procedures gave the Commission thirty days in which to rule finally on the suspension. Thus, under the New York system trainers like Barry, subject to brief suspensions, would never receive any process at all.

Noting (App., *infra*, 5a) that, under the Speedy Trial Act, 18 U.S.C. 3161(c)(1), which requires that a criminal trial begin within 70 days (not including any "excludable time") after the filing of an indictment, Mallen's criminal trial could be over (assuming minimal "excludable time") before the expiration of the period permitted by Section 1818(g), the district court concluded that the statute's post-suspension hearing was a "toothless" remedy, because it would give Mallen meaningful process only if the FDIC wanted it to (App., *infra*, 11a-12a). The district court was unable to find any persuasive reason why the FDIC should need 90 days to make a decision (*id.* at 16a).

The district court also found the statute unconstitutional because it gives the FDIC discretion to receive or not receive oral testimony. The court reasoned that "at some point, the plaintiff in a case such as this should have an opportunity to present live witnesses" (App., *infra*, 15a) and determined that the FDIC had given no persuasive reason why "denial of the opportunity to present

[oral] evidence is in the sole discretion of a hearing officer" (*id.* at 16a). Rather than order the FDIC to adhere to a stricter timetable and to allow oral testimony at the hearing, the court concluded that the post-suspension procedures "violate due process" and enjoined the FDIC from enforcing the Notice and Order of Suspension against Mallen (*id.* at 18a).

On February 27, the FDIC moved the district court to amend its order. The FDIC proposed that, rather than being enjoined entirely from enforcing the suspension order, it be required to provide Mallen with a prompt hearing, to hear oral testimony, and to make its decision promptly thereafter (App., *infra*, 20a). At a March 6 hearing before the district court, the FDIC suggested that it hold a hearing on March 9, with an oral disposition by March 26 and written disposition by April 8 (*ibid.*).

On March 10, the district court entered an order refusing to amend its earlier order. It noted that Mallen's criminal trial was scheduled to begin on March 16 and was estimated to last one week. Thus, as the district court understood the situation, the FDIC's decision on the suspension would be entered "only after Mallen has 'suffered the full penalty' imposed by the suspension." App., *infra*, 20a (quoting *Barry* v. *Barchi*, 443 U.S. at 66). The district court also thought it unfair to Mallen to permit the FDIC to conduct a hearing on the suspension at a time so close to Mallen's criminal trial (App., *infra*, 21a-22a). The next day, the district court denied the FDIC's motion for a stay pending appeal (*id.* at 24a-26a).[6] The FDIC then noticed an appeal from the district court's ruling to this Court (*id.* at 33a-34a).

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[6] The district court did stay its order "[t]o the extent that this Court's rulings have an impact on other cases involving indicted bank officers" (App., *infra*, 25a). Mallen and the bank were the only plaintiffs in the district court proceeding.

3. Mallen's criminal trial began on March 16. On March 24, the jury convicted him on both counts of the indictment. On May 1, the district court (not the judge in this case) sentenced Mallen on the second count to three years' imprisonment, suspended all but sixty days, and fined him $10,000. The court set aside the first count, finding the indictment defective. Mallen's appeal, and the Government's cross appeal of the dismissal of the first count of the indictment, are pending in the United States Court of Appeals for the Eighth Circuit (Nos. 87-1590 and 87-1722); briefing has not been completed and oral argument has not yet been scheduled.

A different provision of law, 12 U.S.C. 1829, prohibits any person who has been convicted of a crime involving "dishonesty or breach of trust" from serving as a director or officer of a bank insured by the FDIC unless the FDIC consents in writing. After Mallen's conviction, the FDIC informed him that it would not consent to his service at Farmers State Bank. Mallen took the position that the Section 1829 bar does not apply until his appeals are finally disposed of. The FDIC then obtained a preliminary injunction, from the court that had heard the criminal case, restraining Mallen from serving as a director, officer, or employee of the bank (No. C-87-3053 (N.D. Iowa)).[7] Although this injunction now restrains Mallen from serving as the bank's President or as a director, the injunction does not prevent him from otherwise participating in the bank's affairs, including by voting his stock in the holding company. Hence this injunction is, in a material respect, less broad than the notice of suspension and prohibition at issue in the present case. See *Feinberg* v. *FDIC*, 420 F. Supp. 109, 112-115 (D.D.C. 1976) (three-judge court) (challenge to earlier version of Section 1818(g) prohibition

[7] The FDIC has moved for a permanent injunction. No date has been set for a hearing on this motion.

not mooted by conviction because Section 1829 disqualification not as broad as Section 1818(g) prohibition).

The FDIC now appeals from the district court's order holding Section 1818(g) unconstitutional.

THE QUESTIONS ARE SUBSTANTIAL

In Section 1818(g), Congress gave the federal banking agencies the power to order the immediate suspension of any bank officer or director who is indicted for a felony involving breach of trust or dishonesty. The original version of Section 1818(g) provided for no pre- or post-suspension hearing. After a three-judge court ruled (in *Feinberg* v. *FDIC*, *supra*) that the Constitution requires at least a post-suspension hearing, Congress added Section 1818(g)(3), which provides that (1) the suspended director or officer may request a hearing, (2) the banking agency must hold a hearing within 30 days after receiving a request, (3) the agency may in its discretion receive or decline to receive oral testimony, and (4) the agency must issue a written decision within 60 days after the hearing. The district court in the present case declared Section 1818(g) invalid on the ground that it allows up to 90 days before a decision is issued, and on the ground that it permits the agency to decline to receive oral testimony at the hearing.

This decision, which essentially nullifies the banking agencies' power of suspension under Section 1818(g), is erroneous. We agree that Mallen's interests in his positions with the bank and in his ability to vote his stock in the holding company are "property" protected by the Fifth Amendment. But the district court erred in ruling that Section 1818(g) denies him due process of law. The time periods provided by the statute comport with the requirements of due process under the circumstances. The opportunity to present oral testimony is not, under the circumstances, a requirement of due process, and even assuming it were, the district court erred in invalidating

the power of suspension in its entirety rather than directing the FDIC to receive oral testimony. This Court's review is plainly warranted.

1. a. Section 1818(g) was originally enacted as part of the Financial Institutions Supervisory Act of 1966, Pub. L. No. 89-695, 80 Stat. 1028 (the 1966 Act). On its face, it reflects Congress's determination that persons who have been indicted for serious crimes involving dishonesty or breach of trust should be subject to summary suspension from participation in the affairs of federally insured banks. Section 1818(g) is only one of several provisions reflecting the importance of swift summary action by bank regulatory agencies to protect insured banks from conditions that threaten their depositors or public confidence. See, *e.g.*, 12 U.S.C. 1818(c) (temporary orders to cease and desist from unsafe or unsound practices).[8]

As originally enacted, Section 1818(g) did not refer to a threat to the interests of the bank's depositors or to pubic confidence and contained no provision for a hearing either before or after suspension. Congress expected that suspension following indictment would be "virtually routine" (S. Rep. 1482, 89th Cong., 2d Sess. 2 (1966)) and apparently believed it constitutionally sufficient that the outcome of the criminal proceedings would either terminate the suspension or lead to permanent removal. The section as original enacted was challenged in *Feinberg* v. *FDIC*, 420 F. Supp. 109 (D.D.C. 1976) (three-judge court). Feinberg was indicted for conspiracy to commit mail fraud, and the FDIC suspended him from his position as President and a director of the Jefferson State Bank of Chicago and prohibited him from participating in the bank's affairs. Feinberg brought suit, claiming that he had been deprived of liberty and property without due process, since he had

[8] See also note 2, *supra*.

been provided with nothing more than an informal conference with FDIC officials prior to his suspension (420 F. Supp. at 111).

The court in *Feinberg* recognized the dangers to banks and their depositors potentially arising from continued participation in their affairs by persons indicted for serious crimes, and it fully appreciated the need for summary suspensions. Based on its examination of the statute and its legislative history, the three-judge court said, "there is a strong governmental-public interest in speedily and efficiently removing indicted officers, directors, or employees from financial institutions, the viability of which depend on the public's confidence" (420 F. Supp. at 119). The court added (*id.* at 120):

> It is clear from the congressional history that Congress, in passing 12 U.S.C. § 1818, was concerned with the dangerous effect of the public's loss of confidence in financial institutions. Notably, section 1818 was introduced at the request of the regulatory agencies, its purpose being the creation of more effective regulatory powers to deal with crises in financial institutions. 112 Cong. Rec. 10077-84, 20223-48 (1966). The Senate Committee Report stated:
>
> > "Existing remedies have proven inadequate. On the one hand they may be too severe in many situations, such as taking custody of an institution or terminating its insured status. On the other hand they may be so time consuming and cumbersome that substantial injury occurs to the institution before remedial action is effected." *Id.* at 20082.

In order to maintain the public's confidence, Congress agreed with the agencies that immediate action was necessary where a director, officer or employee of an insured bank was indicted for a felony involving

> dishonesty or breach of trust. To delay this action, which occurs in the form of a Notice and Order of Suspension, would thus seriously and directly undermine the congressional purpose behind Section 1818(g)(1).

Accordingly, the three-judge court ruled that a pre-suspension hearing was not constitutionally required (*ibid.*).

The *Feinberg* court also observed that it "appears arguable that if the issuance of a Notice and Order of Suspension were automatic upon the return of an indictment or the filing of an information or complaint, then there might not be a need for a hearing" (420 F. Supp. at 116). Noting, however, that the statute required the agency to decide whether the crime *is* one involving "dishonesty or breach of trust" and that the word "may" (issue a notice of suspension) apparently contemplated some exercise of discretion, the court ruled that Section 1818(g) as originally enacted was unconstitutional for failure to provide any hearing at all. The court stated that at a minimum due process required an "immediate post-suspension hearing" (420 F. Supp. at 120). The court added that in its view "notice, the opportunity to be represented by counsel, for written submissions, and for oral argument, appear mandated by the circumstances" (*ibid.*), but that " 'the nature of the relevant inquiry' * * * does not seem to require any more than written submission [of evidence]" (*ibid.* (footnote omitted) (quoting *Mathews* v. *Eldridge*, 424 U.S. at 343)).

In direct response to *Feinberg*, Congress amended paragraph (1) of subsection (g), adding the reference to a threat to the interests of depositors or to public confidence, and added paragraph (3) to subsection (g), providing that a post-suspension hearing, following the procedures outlined generally by the *Feinberg* court, must be convened within 30 days, with a written decision to follow

within 60 days. Pub. L. No. 95-630, § 111(a)(1), 92 Stat. 3665-3666. The House Report accompanying this amendment explained that *Feinberg* had held that "the removal statute was deficient since it did not provide opportunity for hearing and review of an agency's action. Under the provisions of H.R. 13471 an individual will now have that opportunity" (H.R. Rep. 95-1383, 95th Cong., 2d Sess. 19 (1978).

Section 1818(g) thus reflects Congress's specific determination that a summary suspension power is vital to the protection of insured banks and that the procedures specified—including the time periods allowed and the discretion to accept or not accept oral testimony—meet the requirements of due process. The district court here exercised the federal courts' "ultimate and supreme [power]" (*Chicago & Grand Trunk Ry.* v. *Wellman*, 143 U.S. 339, 345 (1892)) in the face of this deliberate congressional determination.

b. As this Court recently stated, "[a] facial challenge to [the validity of] a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid" (*United States* v. *Salerno*, No. 86-87 (May 26, 1987), slip op. 5). Nevertheless, the district court, on the basis of an unsound analogy to *Barry* v. *Barchi*, held the time limits chosen by Congress unconstitutional in all cases.

In *Barry*, the Court invalidated a summary 15-day suspension, which was subject to a 30-day post-suspension review, on the ground that under those circumstances the review did not afford any meaningful process at all. Here, the district court asserted that because of the Speedy Trial Act the period of a Section 1818(g) suspension generally would be less than the time allowed by 12 U.S.C. 1818(g)(3) for a hearing and decision, rendering the post-suspension process similarly meaningless.

But the premise of this argument, that a Section 1818(g) suspension would normally last less than 90 days, is demonstrably quite wrong. First, the 70-day period provided for by the Speedy Trial Act is subject to several categories of "excludable time," and a great many criminal trials, including Mallen's, have taken more than 90 days from indictment to verdict. More important, the court misunderstood the duration of a Section 1818(g) suspension, which continues until "such information, indictment, or complaint is finally disposed of or until terminated by the agency." It is clear from the structure of Section 1818(g) that this refers to the completion of appellate review of a conviction, because the ensuing remedy, permanent removal after conviction, cannot be imposed until the conviction is no longer subject to appellate review. 12 U.S.C. 1818(g)(1). The district court in *Feinberg* understood this point and noted that "such a final disposition, considering the possible appellate avenues, presents the possibility of a substantial passage of time" (420 F. Supp. at 119). Mallen's indictment has not yet been finally disposed of for purposes of the statute, and may not be for a considerable period. Meanwhile, had the district court not intervened, Mallen would have had his hearing and final determination, on a suspension that began last January 26, some time last April at the latest.

The district court, relying on the misplaced analogy to *Barry*, made no serious examination of whether Congress was justified in allowing up to 30 days to hold a hearing, and up to 60 days thereafter for a decision, before a person under indictment for a felony involving a breach of trust or dishonesty may be returned to a position of trust at an insured bank. As this Court has noted, "there is no obvious bright line dictating when a [post-suspension] hearing must occur" (*United States* v. *Eight Thousand Eight Hundred and Fifty Dollars* ($8,850), 461 U.S. 555,

562 (1983)). We respectfully suggest that in this instance the congressional judgment was entitled to deference and should have been sustained.

An indictment reflects the grand jury's determination that there is probable cause to believe that the accused has committed the felony charged (see *United States* v. *Calandra*, 414 U.S. 338, 343 (1974)); the decision to indict "is made by a deliberative public body acting as an arm of the judiciary, operating under constitutional and other legal constraints" (*James A. Merritt and Sons* v. *Marsh*, 791 F.2d 328, 330 (4th Cir. 1986)). Where the felony charged involves dishonesty or breach of trust, the grand jury's determination plainly raises the most serious questions about whether the officer should continue to participate in the conduct of the affairs of a federally insured bank.[9] Particularly in view of the fact that the grand jury determination provides "an initial check against mistaken decisions" (*Cleveland Bd. of Educ.* v. *Loudermill*, 470 U.S. 532, 545-546 (1985)), the 90-day maximum period allowed for final decision on Section 1818(g) suspensions falls well within the range this Court has found acceptable. See, *e.g.*, *Eight Thousand Eight Hundred and Fifty Dollars*, 461 U.S. at 565 (18-month delay between seizure of currency and commencement of forfeiture action "quite significant" but not excessive); *Loudermill*, 470 U.S. at 545-546 (nine-month delay in post-termination review acceptable where pretermination hearing provided "initial

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[9] Federal crimes for which the penalty may exceed one year in prison may be prosecuted only by indictment, unless the defendant waives that right (Fed. R. Crim. P. 7(a) and (b)). Section 1818(g) also permits suspension of officers and directors accused in a complaint authorized by a United States Attorney or in an information, including an information charging a state crime. A suspension based on an accusation not amounting to a determination of probable cause might present statutory or constitutional questions not presented in this case.

check"); cf. *Mathews* v. *Eldridge*, 424 U.S. at 341-342; *Arnett* v. *Kennedy*, 416 U.S. 134, 167-171 (1974) (Powell, J., concurring); *Dixon* v. *Love*, 431 U.S. 105, 109-110 (1977).

There are sound reasons for the statutory timetable. Where possible, the FDIC schedules a hearing to be held in less than 30 days, as it did here. But the FDIC, which does not employ any administrative law judges, generally secures the services of a retired administrative law judge to conduct the hearing. And the FDIC Regional Counsels' normal practice is to offer oral testimony (subject to cross examination) and not to object to the presentation of oral testimony by the respondent (see generally Hearing Tr. 60-61). Finding a date that is mutually convenient for the administrative law judge, counsel, and witnesses, and which allows for preparation time, may in some instances require the full 30 days Congress allowed.

The 60 days permitted for decision (accompanied by a written explanation) is also not an unreasonable period, given the agencies' other responsibilities (which in the case of the FDIC include insurance and oversight responsibility for more than 15,000 insured banks) and the high stakes involved. The decision of the FDIC to return to a position of trust at a federally insured bank an individual who has been indicted for a felony involving personal dishonesty or breach of trust is a significant one. Indeed, because of the seriousness of felony charges against "bank officers and savings and loan officers who are handling other people's money by virtue of a special governmental license granted to them in the public interest" (112 Cong. Rec. 20080 (1966) (remarks of Sen. Proxmire, Senate sponsor of 1966 Act, explaining importance of new regulatory powers)), Congress regarded suspension following indictment as "virtually routine" (S. Rep. 1482, 89th Cong., 2d Sess. 2 (1966)). Congress later reasonably provided enough time

for prompt but meaningful agency consideration before the agency acts on the suspended officer's request that it terminate or modify the suspension.

The interest of the suspended officer is of course not insubstantial. But in circumstances where it has been determined that there is a basis for charging him with a felony involving breach of trust or dishonesty, the suspended officer's interest simply cannot outweigh the public interest in due consideration before he is returned to a post at a federally insured bank.

2. The district court also held Section 1818(g) unconstitutional because it gives the agency discretion (which the FDIC has delegated to the hearing officer (12 C.F.R. 308.61(e)) to decide not to receive oral testimony. This ruling was error for two reasons.

First, although as noted above it is the normal practice of FDIC Regional Counsels not to object to oral testimony, the opportunity to present oral testimony is not, under the circumstances, a requirement of due process. The fact of indictment for a felony involving breach of trust or dishonesty is itself constitutionally sufficient to justify suspension from a position of trust at a federally insured bank, and as noted Congress believed that suspensions would be "virtually routine." The questions left to the agency are whether the crime charged *is* a crime involving breach of trust or dishonesty, and whether continued participation in the bank's affairs by a person so charged would threaten the interests of depositors *or* public confidence in the bank; these are primarily matters of law and expert agency judgment.[10] The officer is permitted, in

[10] In particular, the agency's task does not include evaluating the likelihood that the officer is guilty of the crime charged: that is the responsibility of the criminal process, and FDIC regulations preclude consideration of this issue (see 12 C.F.R. 308.56(a)). The question for the agency—one of law and expert judgment—is whether the *acts charged* are such as to suggest a threat to the bank's depositors or to public confidence.

person or through counsel, to address these questions in written submissions and oral argument. But it is as true under the amended statute as it was at the time of *Feinberg*, that "the 'nature of the relevant inquiry' * * * does not seem to require any more than written submission" (420 F. Supp. at 120 (footnote omitted) (quoting *Mathews*, 424 U.S. at 343)). Cf. *Greenholtz* v. *Nebraska Penal Inmates*, 442 U.S. 1, 16 (1979).

Second, even if the Constitution did require the opportunity to present oral testimony, the proper judicial course would have been to order the agency to receive it. Especially in light of this Court's expressed willingness "to assume a congressional solicitude for fair procedure" (*Califano* v. *Yamasaki*, 442 U.S. 682, 693 (1979) (citation omitted)), a court might conclude that it could construe the statute as not authorizing the FDIC to exercise its discretion in an unconstitutional manner. Such a reading, under which the agency would have to determine its constitutional obligations in order to comply with the statute, would avoid attributing to Congress the "unusual doctrine * * * that the [agency] may not construe its own statutory mandate in light of federal constitutional principles." *Ohio Civil Rights Comm'n* v. *Dayton Christian Schools, Inc.*, No. 85-488 (June 27, 1986), slip op. 8-9 (citing *NLRB* v. *Catholic Bishop*, 440 U.S. 490 (1979)). Alternatively, the court could simply order the agency to exercise its discretion in the manner permitted by the Constitution. Finally, if the court concluded that the statute could not be construed so as to preserve its constitutionality, the proper course would have been to invalidate the statute insofar as it purported to confer discretion to decline to receive oral testimony—not to invalidate the entire suspension procedure. As this Court has often said, " '[a] court should refrain from invalidating more of the statute than is necessary.' " *Alaska Airlines, Inc.* v. *Brock*, No. 85-920 (Mar. 25, 1987), slip op. 5 (quoting *Regan* v. *Time, Inc.*, 468 U.S. 641, 652 (1984)).

CONCLUSION

Probable jurisdiction should be noted.

Respectfully submitted.

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JULY 1987

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
CENTRAL DIVISION

No. C 87-3016

JAMES E. MALLEN, AND FARMERS STATE BANK, PLAINTIFFS,

v.

FEDERAL DEPOSIT INSURANCE CORPORATION, DEFENDANT.

[FILED FEB. 17, 1987]

ORDER

The Court has before it the Motion for Temporary Restraining Order, and for Preliminary Injunction filed by the Plaintiffs James E. Mallen and the Farmers State Bank, Kanawha, Iowa on February 6, 1987. The Court held oral argument on the Motion on February 10, 1987 at which all parties were represented by counsel. The parties have also submitted evidence in the form of affidavits and exhibits. Since the Court has received input at a hearing and briefs from both sides, the Court considers this on the Motion for Preliminary Injunction. The same is hereby sustained as set out herein, and an Order is entered declaring that the FDIC's "Notice and Order of Suspension" which had prohibited James Mallen from participating in any manner in the conduct of the affairs of the Farmers State Bank, Kanawha, Iowa is null and void. The FDIC is enjoined from enforcing the "Notice and Order of Suspension and Prohibition pursuant to 12 U.S.C. Section 1818(g) of the act based on the December 10, 1986 Indictment.

Plaintiffs bring this action challenging the suspension on January 26, 1987 by the Federal Deposit Insurance Corporation (FDIC) of James E. Mallen, the President and Secretary of the Farmers State Bank, and a member of the Board of Directors.

I. Factual Background

On December 10, 1986, an indictment was returned by the Grand Jury in Cedar Rapids, Iowa charging James E. Mallen in two counts for felonies in connection with his employment as President and as a Director of Plaintiff Farmers State Bank of Kanawha, Iowa. In Count 1 of the Indictment, Mallen is charged with making a false statement to the Farmers State Bank, for the purpose of influencing the actions of the Federal Deposit Insurance Corporation, an alleged violation of 18 U.S.C. Section 1014. Mallen allegedly omitted disclosing in a financial statement submitted on or about January 15, 1982 that he had a financial interest in two other businesses, Mallen, et. al., and Elmwood Limited Partnership. Conviction of Count 1, a felony, carries a maximum penalty of two (2) years imprisonment and a $5,000 fine.

In Count 2 of the indictment, Malien is charged with making a false statement to a federal agency in violation of 18 U.S.C. Section 1001. Mallen allegedly failed to disclose on a Bank Officer's Questionnaire form submitted to the FDIC on or about November 22, 1982 that accomodation loans were made to the following individuals, Carl Martin, dated November 13, 1981; William Dahl, Carl Martin, and Robert and William Shipman, dated February 26, 1982; and Robert and William Shipman, dated May 17, 1982. Conviction of Count 2, a felony, carries a maximum penalty of five (5) years imprisonment and a $5,000 fine.

On January 26, 1987, James Mallen was served notice that the Federal Deposit Insurance Corporation (FDIC)

had suspended him pursuant to 12 U.S.C. Section 1818(g) from further service or participation in the conduct of the affairs of the Bank. (Exhibit 2 to Affidavit of James P. McCarthy). The "Notice and Order of Suspension and Prohibition" was dated January 20, 1987 and was effective by its terms upon service of the Notice. The Notice is signed by Hoyle G. Robinson, Executive Secretary of the Federal Deposit Insurance Corporation. The Notice relies on the fact an indictment (Exhibit 1 to McCarthy Affidavit) alleging crimes involving dishonesty or breach of trust had been filed against Mallen, and in pertinent part the notice states:

> It further appearing that continued service or participation by Respondent in the conduct of the affairs of the Bank *may pose a threat to the interests of the Bank's depositors or may threaten to impair public confidence in the Bank.*

There are no written reasons supporting the above "finding". This finding is merely a recitation of the statutory language which language establishes the minimal findings required for suspension under 12 U.S.C. Section 1818(g) where an indictment has been filed against a bank officer of an FDIC insured bank. *See* 12 U.S.C. Section 1818(g)(1); 12 CFR Section 308.57.

Neither Mr. Mallen or the Farmers State Bank were given an opportunity to present any evidence or argument under 12 U.S.C. Section 1818(g) to the FDIC before the issuance of the suspension.[1] The lack of a pre-suspension hearing is consistent with the statutory scheme under Section 1818(g), and Section 308 of the Code of Federal Regulations.

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[1] In September and October 1986, a two week administrative hearing concerning whether or not to suspend Mallen was held pursuant to 12 U.S.C. Section 1818(e). No result in the subsection (e) hearing was reached. The presiding administrative law judge recused himself before ruling.

On January 30, 1987, plaintiff's Attorney Mr. McCarthy wrote to Hoyle L. Robinson, Executive Secretary of the FDIC demanding an immediate administrative hearing under 12 U.S.C. Section 1818(g) with both oral testimony and written evidence. (Exhibit 4 to McCarthy Affidavit).

Regional Counsel initially took the position that the hearing should simply be oral argument on written submissions to be held no earlier than February 25, 1987, in reliance on Section 1818(g)(3) which says that the FDIC may take up to 30 days to set a post-suspension hearing. (Exhibit 6 attached to McCarthy Affidavit). The parties have informed the Court that a post-suspension hearing has now been set for Wednesday, February 18, 1987. It is not clear whether oral evidence would be permitted, since denying permission to present oral evidence is in the discretion of the hearing officer as set out in the FDIC's rules, which state:

> At the discretion of the presiding officer witnesses may be presented within specified time limits, provided that a list of witnesses is furnished to the presiding officer prior to the hearing.

12 CFR Section 308.61(e). After the hearing, the hearing officer must make a recommendation, where possible, to the executive Board within ten days after the record is closed. 12 CFR Section 1261(h). The record "shall remain open for 5 business days following the hearing for the parties to make additional submissions to the record. The record shall thereafter be closed." 12 CFR Section 308.61(g). Under 18 U.S.C. Section 1818(g)(3), the Executive Board can take up to 60 days from the date of hearing to rule on whether the suspension will be continued, terminated, or otherwise modified. The FDIC's regulations purport to lengthen this time by an additional five days, representing the five day period after the hearing during which the record remains open. Thus, under the regulations, one could be forced to wait up to 95 days

before a post-suspension disposition. The affected individual then has up to ten days to petition for reconsideration. 12 CFR Section 308.63.

Under the Speedy Trial Act, 18 U.S.C. Section 3161(c)(1), not including "excludable time", the trial of a criminal defendant must start within 70 days of the filing date and making public of an indictment, or from the date the defendant first appears before a judicial officer of the court, whichever date last occurs.

As mentioned above, under Section 1818(g)(3), and the FDIC's regulations, the agency could delay a disposition for up to 95 days. Ninety-five days is longer than the Speedy Trial deadline for the parallel criminal case. The administrative hearing is set for February 18, 1987. The trial of Mallen's criminal case is set for March 16, 1987. As applied in this case, the subsection (g) post-suspension process could take longer to conclude with a disposition than the criminal proceedings. Following its own regulations, the FDIC could delay ruling on the merits of the Mallen's suspension until April 24, 1987. By that time the criminal trial will be completed. If Mallen is found *not guilty*, the FDIC would no longer have a suspension remedy under Section 1818(g) since there no longer would be a pending indictment. If no disposition on the administrative hearing is reached before the criminal trial, the purpose of the hearing may become moot. The FDIC may still have an immediate suspension remedy under Section 1818(e) if in the opinion of the FDIC Mallen violated a law, rule, or regulation, or has engaged or participated in any unsafe or unsound practice in connection with the bank, or has breached a fiduciary duty under certain circumstances prescribed in Section 1818(e)(4).[2] If Mallen is

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[2] However, there are protections in Section 1818(e)(4) actions not found in Section 1818(g) actions. Section 1818(e)(4) refers to Section 1818(f) which provides that the injured party may petition to the

found *guilty*, the purpose of the hearing becomes moot because according to the FDIC's lawyers, the FDIC will not permit a convicted person to hold a position as officer or director of an FDIC insured bank without prior FDIC approval. The bottom line is that the Section 1818(g) post-suspension hearing provided by the FDIC is meaningless, or nearly so, if the Executive Board of the FDIC postpones its disposition as the statute and its rules allow.

II. Discussion

The plaintiffs challenge the post-suspension process on the basis that its insufficiencies violate their rights to procedural due process of law under the Fifth Amendment to the United States Constitution. They argue that 12 U.S.C. Section 1818(g) is unconstitutional because it does not assure them of an opportunity to present oral testimony, does not assure them of a prompt disposition, and does not permit judicial review. The Court finds that the statute, and rules enacted thereunder, do not provide for a full hearing permitting oral evidence, and a prompt disposition. For these reasons, based on the record made thus far, the Court would find that 12 U.S.C. Section 1818(g) is unconstitutional. The Court does not reach the plaintiffs' contention that Section 1818(g) is also constitutionally infirm because it does not provide for judicial review.[3]

United States District Court within ten days for a stay of the suspension order pending completion of the administrative process.

[3] The Court does not feel the briefing on the issue of judicial review was sufficiently complete to render a fair ruling. The Court concludes that it is unnecessary to reach this issue in view of its determination that the statute is unconstitutional for the other reasons mentioned above. The Court notes that while the statute does not provide for judicial review of the agency's action, a federal district court may have jurisdiction to review the decision of the agency if it is alleged the decision violates substantive due process. *See eg., Littlefield v. City of Afton*, 785 F.2d 596, 608 (8th Cir. 1986); *Williams v. St. Louis*, 783 F.2d 114, 118 (8th Cir. 1986).

Whether a preliminary injunction should issue involves the consideration of (1) the threat of irreparable harm to the movant; (2) the state of the balance between this harm and the injury granting the injunction will inflict on other parties litigant; (3) the probability of success on the merits; and (4) the public interest. *Dataphase v. C L Systems, Inc.*, 640 F.2d 109, 113 (8th Cir. 1981). The Court finds that each of these factor weighs in favor of granting preliminary injunctive relief.

Regarding the first factor, the Eighth Circuit has held that the deprivation of a fundamental constitutional right would support the finding of irreparable injury. *Planned Parenthood v. Citizens for Community Action*, 558 F.2d 861, 867 (8th Cir. 1977); *see* 11 C. Wright and A. Miller, *Federal Practice and Procedure* Section 2948 at 440 (1973). The Court finds that there is a threat of irreparable harm based on the threatened violation of the fundamental constitutional right to procedural due process. For the reasons set out below, the Court also finds that the remaining factors for entry of an injunction are met. The discussion below concerning procedural due process does not express this Court's final opinion on the procedural due process issue. The ruling below that Section 1818(g) does not accord with procedural due process is premised on the record before the Court at this time. It is not intended to express a final view on the merits of the issue.

Regarding the second factor, the Court finds that particularly grave consequences could result to the plaintiff Mallen's property interests, since the FDIC has taken away his rights to participate in the bank, and he is not only president and a director, but has a large ownership interest in the bank. On the other hand, the Court recognizes the FDIC's duty to ensure the integrity of the banking system.

However, the suspension of bank officers may only be done in constitutionally permissible ways. Since based on the record thus far, this Court would find that Section 1818(g) does not provide constitutionally adequate post-suspension proceedings, the balance of harm from not granting an injunction would fall on Mallen. The harm to the FDIC would be slight because the FDIC may have alternative statutory remedies for seeking the suspension of Mallen.

The discussion that follows focuses on the final two factors, probability of success on the merits, and the public interest.

"Procedural due process imposes constraints on governmental decisions which deprive individuals of 'liberty' or 'property' interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendments." *Mathews v. Eldridge*, 424 U.S. 319 (1976). Before the Court can determine whether any process is due, the Court must determine whether the interest at stake is a constitutionally protected liberty or property interest. The Court finds that there is a constitutionally protected property interest at stake for both plaintiffs based on the facts that follow.

James Mallen is the President of the Farmers State Bank, Kanawha, Iowa. He is the largest stock holder in Kanawha Investment Holding Company which is a one bank holding company owning 92% of the Farmers State Bank corporate stock. He is a member of the Board of Directors of the holding company and the bank. He holds the offices of President and Secretary of the Bank. Mallen holds the offices of President and Secretary of the holding company. He has held these offices since 1976.

The Farmers State Bank is a small agricultural bank in a town of 750 people with assets of $18 million. As Bank President Mallen is one of three loan officers and supervises all employees. Mallen's removal from the Bank could cause an extreme hardship on the bank. It is an ongoing

business that requires important business decisions be made daily regarding extensions of credit, collection of problem loans, and investment of bank funds. It would appear that Mallen's role in the day-to-day operations and decision making for the bank was pivotal.

On these facts, the Court is persuaded that both Mallen and the Bank have property interests entitled to protection under the due process clause regarding Mallen's continued employment. *Feinberg v. Federal Deposit Insurance Corp.*, 522 F.2d 1335, 1340 (D.C. Cir. 1975). (Property interests include a person's salary and the right to vote his or her stock).

Having concluded that the plaintiffs have a property interest protected under the due process clause, the Court turns to the more difficult question of what process is due. "The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner." *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976). In *Mathews*, the Court stated that "identification of the specific dictates of due process generally requires consideration of three distinct factors:"

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Id. at 335. In *Mathews*, the Court analyzed these factors in relation to what pre-deprivation process was due. Generally, *before* the Government deprives a party of a constitutionally protected interest, it must provide a pre-deprivation hearing, if practicable. *Westborough Mall, Inc. v. City of Cape Girardeau*, 794 F.2d 330, 337 (8th Cir.

1986). Courts, however, recognize two narrow exceptions to the general rule. *Moore v. Warwick Public School Dist. No. 29*, 794 F.2d 322, 327 (8th Cir. 1986). The first exception to the rule that some type of pre-deprivation process is necessary applies in those situations requiring quick action by the State when there is a compelling or overriding state interest in a summary adjudication. *See eg., Mackey v. Montrym*, 443 U.S. 1 (1979). The second situation is where the deprivation is the result of a "random and unauthorized" act by a state employee not the result of some established state procedure where it is not only impracticable, but impossible to provide a meaningful hearing before the deprivation. *See eg. Parratt v. Taylor*, 451 U.S. 527, 536-44 (1981); *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 435-36 (1982).

The FDIC delayed its suspension of Mallen until one month and one-half after the filing of the indictment. The suspension of Mallen cannot be termed swift. There may be some question concerning whether pre-deprivation process was entirely impractical in this case. However, to the extent plaintiffs argue that the FDIC acted unconstitutionally in not providing pre-deprivation procedures, the Court rejects plaintiffs' position because they simply have not met their burden on this issue. The Court is persuaded that this case falls under the first exception to cases in which pre-deprivation hearings are impractical since in cases such as this there generally is a compelling interest in a summary adjudication.

The Court turns next to the question of whether the post-deprivation process is adequate.[4] The Court concludes that the post-deprivation process is inadequate since there is no opportunity to be heard at a meaningful time, in a meaningful manner. *Mathews, supra*, 424 U.S.

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[4] The question of whether the post-deprivation process under subsection 8(g) is adequate is placed at issue in paragraph 24 of the plaintiff's complaint.

at 433. This Court's analysis of the three factors of *Mathews* set out above would be the same as the Court in *Feinberg, supra*, 420 F.Supp. at 119-21, except with regard to the type of hearing that would be required, and the Court will not repeat in full the analysis applied there.

In *Feinberg*, the predecessor to Section 1818(g) was found to be constitutionally infirm by a three judge district court panel since it did not provide for an "immediate" post-deprivation hearing. *Feinberg, supra*, 420 F.Supp. at 121. Subsequently, section (g) was amended in 1978, adding subsection (g)(3) to provide for a post-suspension hearing as set out previously in this Order. Central to the reasoning in *Feinberg* was the following:

> The criminal trial is hardly the proper or timely hearing for the deprivation at issue. Despite the Speedy Trial Act, 18 U.S.C. Section 3162 *et seq.* (Supp. 1976), the interim between indictment and trial is sufficient time within which plaintiff's interest could be permanently and irreparably impaired.

420 F.Supp. at 118. Of further importance to the Court in *Feinberg* was the fact that the criminal case would not resolve the issues involved in the decision to suspend. Specifically, the criminal trial would not resolve the issues under Section 1818(g) of whether the crime is one involving dishonesty, and whether the officer or director may pose a threat to the bank, or impair public confidence in the bank. Indeed, plaintiffs contend that the bank and its depositors would be more threatened in Mallen's absence.

The new administrative remedy provided by Congress is a toothless remedy for the plaintiffs since the agency can postpone a disposition until after the criminal trial has concluded. It is a remedy only if the agency chooses for it to be a remedy. This clearly was not the intent of the Court in *Feinberg*. 420 F.Supp. at 118. The constitutional process due in any particular situation cannot be exercised at the choice of the government. The process due is a matter

of federal constitutional law, and cannot be diminished by the fact a statute sets forth its own procedures that it deems adequate for determining the preconditions to adverse action. *Cleveland Board of Education v. Loudermill,* 470 U.S. 532, 541 (1985).

The post-suspension process in the amended subsection (g)(3) is constitutionally inadequate because it does not contemplate a "prompt" disposition. This case is analagous [*sic*] to *Barry v. Barchi,* 443 U.S. 55 (1979). In *Barry*, a horse trainer's license was suspended under a New York statute because post-race results on his horse revealed the presence of drugs. No pre-suspension hearing was held, nor did the Supreme Court find that the same was due under the Due Process Clause given the State's compelling interest in insuring the integrity of horse racing. However, the Court concluded that the post-suspension procedures provided for by statute violated due process because the statute did not provide for a "prompt" hearing and final disposition on the merits either as drafted or as applied. There was no provision for when the hearing should be held, and a ruling was not required until 30 days after the hearing. The Supreme Court stated in pertinent part:

> Here, the provision for an administrative hearing, neither on its face nor as applied in this case, assured a *prompt proceeding and prompt disposition* of the outstanding issues between Barchi and the State. Indeed, insofar as the statutory requirements are concerned, it is as likely as not that Barchi and others subject to relatively brief suspensions would have no opportunity to put the State to its proof *until they have suffered the full penalty imposed.* Yet, it is possible that Barchi's horse may not have been drugged and Barchi may not have been at fault at all. Once suspension has been imposed, the trainer's interest in a speedy resolution of the controversy becomes paramount, it seems to us.

> We also discern little or no state interest, and the State has suggested none, in an appreciable delay in going forward with a *full* hearing.

443 U.S. at 66. (emphasis supplied). Later, in *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985), the Court held that a nine month delay in the final disposition of a security guard's post-termination hearing was not unconstitutional. However, in *Loudermill,* the plaintiff had a pre-termination hearing, and the delay in the post-termination process was on account of the thoroughness of the process. The interest in speedy resolution here is greater than in *Loudermill,* since the plaintiff here has not had a pre-termination ruling.[5]

The Court finds Judge Bechtle's recent views in an analagous [*sic*] situation involving the "emergency suspension" of an attorney from private practice to be particularly apt here:

> [T]he grave consequences that justify the promulgation and exercise of . . . [an emergency suspension] must carry over to the disposition side of the fulcrum to assure a constitutionally prompt final decision. The Fourteenth Amendment to the United States Constitution will not allow a disciplinary system charged with adjudicating and punishing professional wrongdoing to fiddle, while constitutionally protected property interests burn on the pyre of accusation.

Gershenfeld v. Justices of the Supreme Court of Pa., 641 F.Supp. 1419, 1427 (E.D.Pa. 1986).

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[5] For further authority that the Due Process Clause requires a prompt hearing *and* final disposition *see Gershenfeld v. Justices of the Supreme Court of Pa.*, 641 F.Supp. 1419 (E.D. Pa. 1986), and cases cited therein at p. 1425. *See also Martell v. Mauzy*, 511 F.Supp. 729, 741 (N.D. Ill. 1981) (120 days to conclude post-deprivation review was too long under circumstances).

The statute here is also infirm because it fails to provide for a hearing at which oral evidence can be presented. In *Feinberg*, the Court contemplated that a hearing that would pass due process even if it did not require an opportunity for oral evidence. In *Feinberg*, the Court stated:

> While the hearing need not be a trial-type hearing, notice, the opportunity to be represented by counsel, for written submissions, and for oral argument, appear mandated by the circumstances. . . . As to the presentation of live evidence, the "nature of the relevant inquiry", 424 U.S. 343, 96 S.Ct. at 907, does not seem to require any more than written submission. However, oral argument would be necessary.

However, the scope of the hearing was not among the issues squarely presented to the Court in *Feinberg*. The Court in footnote 24 noted:

> Plaintiff's counsel in oral argument conceded that a trial-type hearing would not be required under these circumstances. Defendants did not discuss what would be the minimal due process requirements under the circumstances, choosing to rest on their argument that no hearing is required by the Constitution.

(*Id.* at 120, n. 24). The plaintiff here urges that an evidentiary hearing at which he could present oral testimony is required. This Court agrees that limited oral evidence should be allowed, but the FDIC's rules do not require it, placing the decision on whether to receive oral testimony solely in the discretion of the hearing officer. 12 CFR Section 308.61(e).[6] The Court in *Feinberg* relied on

[6] The parties filed affidavits following the hearing that indicate the hearing officer is considering allowing the parties to present evidence. However, the FDIC has not been able to ensure the Court what type of hearing would be held, presumably because the federal regulations rest sole discretion concerning whether oral evidence will be allowed in

Mathews v. Eldridge, 424 U.S. at 343 in concluding that oral testimony at a post-suspension hearing could be excluded. However, the issue in *Mathews v. Eldridge* concerned what *pre-termination* process was due, and the Court concluded only that an evidentiary hearing was not required *before* termination of disability benefits. 424 U.S. at 349. An evidentiary hearing was, however, required by statute *after* benefits were terminated, and there was provision for subsequent judicial review. In *Arnett v. Kennedy*, 416 U.S. 134 (1974), the Court held that dismissal of a federal employee required pre-termination notice of the action sought, a copy of the charge, reasonable time for filing a written response, and an opportunity for an oral appearance. Following dismissal, an evidentiary hearing was provided. 416 U.S. at 142-46.

The Court is persuaded that at some point, the plaintiff in a case such as this should have an opportunity to present live witnesses. This is particularly true since public confidence in the bank may be undermined by the suspension of the president. This might be particularly true in a small town such as Kanawha, Iowa where the bank's customers are likely to be more familiar with the management of the bank. It would seem that a process that includes the presentation of live testimony and findings by the agency would insure that public confidence would not be eroded. The magnitude of the public interest weighs in favor of an evidentiary hearing. Such a hearing need not be a formal trial type hearing following the rules of evidence. A hearing limited to written submissions and oral argument as described in 12 CFR Section 308.61 could pass constitutional muster if it provided for a sufficiently prompt resolution and if an adverse ruling was followed by a hearing at which oral evidence could be presented. However,

the hearing officer. The Court therefore must address the constitutional issue concerning whether oral evidence should be allowed in a post-suspension hearing.

neither the Code of Federal Regulations, nor the statute provide for a prompt resolution of such a hearing, nor do they provide for a later opportunity to present live testimony.

The FDIC has set forth absolutely no reason justifying the appreciable delay existing in the present statute, nor has it set forth any persuasive reasons concerning why denial of the opportunity to present evidence is in the sole discretion of a hearing officer appointed by the Executive Board of the FDIC. There is no indication in the record that a prompt resolution of these matters would pose any significant administrative burden on the FDIC. Indeed, the Court in *Feinberg* noted that "the costs of providing the incidents of due process would not be significant since there are simply not many Section 1818(g)(1) cases." 420 F.Supp. at 119. Balanced against the administrative cost, is the important public interest in a sound banking system. The results of a suspension of a ten year president at a small bank in some cases may indeed be more catastrophic to the public confidence than his continued employment in spite of a pending indictment.

The FDIC relies on *First Nat. Bank of Grayson v. Conover,* 715 F.2d 234 (6th Cir. 1983) for its contention that Section 1818(g)(1) is constitutional. In *Grayson,* regarding Section 1818(g) the Sixth Circuit stated:

> [T]he statutory scheme involved in the administration of Banks by the Comptroller, the situation involved in this case, affords a full and fair opportunity for a Bank to respond and be heard within a reasonable time and that due process rights are adequately afforded and protected.

715 F.2d at 237. *Grayson,* however, never confronted in its opinion the issue of whether the time for *disposition,* in contrast to the time for hearing, under Section 18181(g)(3) was sufficiently prompt, and this Court concludes that the

possible disposition time is not sufficiently prompt. Indeed, in *Grayson,* the Comptroller had offered in writing to convene a post-suspension hearing within three to five working days, with an oral decision to be rendered within fifteen days after conclusion and a written decision within thirty days. 715 F.2d at 235. Thus, the timliness [*sic*] issue that arises in the instant case never arose in *Grayson.* The timliness [*sic*] issue in this Court's opinion should be controlled by the reasoning previously quoted herein from *Feinberg, supra,* 420 F.Supp. 118, and *Barchi, supra,* 443 U.S. at 66. *See* pp. 11 and 12-13 of this Court's Order.

The Court notes that the FDIC has raised certain jurisdictional arguments, contending that this Court has no jurisdiction to review the suspension order. *citing Grayson, supra,* 715 F.2d at 236-37. However, it is not contended that the Court has no jurisdiction to review the constitutionality of the statutory scheme. The Court concludes that it does have jurisdiction over the constitutional issues under 28 U.S.C. Section 1331.

This Court has been persuaded that it must approach this problem on strict legal issues. The Court is not unmindful of the serious responsibilities placed on the FDIC to properly oversee the nation's banks. The Court is also persuaded that many would conclude that any banker in this situation would be acting more responsibly if he voluntarily withdrew from active participation in the bank until the criminal trial was completed, despite the fact that a defendant in a criminal case is presumed to be innocent. Nothing said in this ruling should in any way be presumed to have any impact on the criminal action facing the Plaintiff Mallen.

> Justice Stevens has said:
>
> The constitutional duty to provide a fair procedure gives the citizen the opportunity to try to prevent the

deprivation from happening, but the deprivation itself does not necessarily reflect any "abuse" of state power.

Daniels v. Williams, 100 S.Ct. 662, 678 (1986) (Justice Stevens concurring). This Court expresses no opinion on the merits of the suspension. The Court concludes only that the post-suspension procedures provided by the statute, based on the record made thus far, violate due process. A preliminary injunction is issued enjoining enforcement of the FDIC's "Notice and Order of Suspension" which had prohibited James Mallen from participating in any manner in the conduct of the affairs of the Farmers State Bank, Kanawha, Iowa. The Court expresses no opinion on whether the FDIC can proceed on the facts here toward suspension of Plaintiff Mallen under 12 U.S.C. Section 1818(e) or any other section.

IT IS THEREFORE ORDERED that the FDIC's "Notice and Order of Suspension" served on plaintiff James Mallen on January 26, 1987, is hereby declared to be null and void.

IT IS FURTHER ORDERED that FDIC is enjoined from enforcing the "Notice and Order of Suspension and Prohibition" pursuant to 12 U.S.C. Section 1818(g) served on James Mallen January 26, 1987.

February 17, 1987

DONALD E. O'BRIEN

Donald E. O'Brien, Chief Judge
UNITED STATES DISTRICT COURT

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
CENTRAL DIVISION

No. 2C 87-3016

JAMES E. MALLEN, AND FARMERS STATE BANK, KANAWHA, IOWA PLAINTIFFS,

v.

FEDERAL DEPOSIT INSURANCE CORPORATION, DEFENDANT.

[FILED MAR. 10, 1987]

ORDER

The Court has before it the defendant's Motion to Alter or Amend Judgment filed February 27, 1987. The Court held a hearing on the Motion March 6, 1987 at which all parties were represented by counsel. After fully considering the arguments of counsel, the Court denies the defendant's motion.

I.

On February 17, 1987, this Court entered an Order declaring the "Notice and Order of Suspension" served on James Mallen January 26, 1987 to be null and void. To remedy the constitutional infirmities[1] of 12 U.S.C. Section 1818(g), the Court enjoined the FDIC from enforcing its "Notice and Order of Suspension" served on James

[1] The Court's ruling was on motion for preliminary injunction, and based only on the record that had been made to the date of the preliminary injunction hearing.

Mallen. The Court found that the statute and rules thereunder did not provide for a *prompt post-suspension hearing and prompt disposition* as required by the Due Process Clause of the Fifth Amendment to the United States Constitution; the Court further found that the statute and rules were unconstitutional because they place sole discretion in the FDIC concerning whether a suspended bank officer would be allowed to present oral evidence at a post-suspension hearing.

The Federal Deposit Insurance Corporation (FDIC) now requests that this Court alter the relief that it ordered. The FDIC proposed that it could hold a post-suspension hearing under 12 U.S.C. Section 1818(g) on March 9, 1987; with an oral disposition within 15 days (March 26, 1987); and written disposition within 30 days (April 8, 1987). The Court finds that this proposed schedule suffers from the same difficulties that prompted this Court's decision of February 17, 1987. Mallen's criminal trial is set for March 16, 1987, and it is estimated that it will last one week. The FDIC'S disposition concerning the suspension under this proposed schedule would be entered only after Mallen has "suffered the full penalty imposed" by the suspension. Ths procedure does not offer a sufficiently prompt process as required under *Barry v. Barchi,* 443 U.S. 55, 66 (1979).

In *Barchi,* the full penalty that was imposed was a fifteen day suspension of a horse trainer by the state agency regulating horse racing. The horse trainer in the *Barchi* case had no opportunity for a disposition before he served the full fifteen day suspension. As Justice Brennan observed in his concurring opinion in *Barchi*, "To be meaningful, an opportunity for a full hearing *and determination* must be afforded at least at a time when the potentially irreparable and substantial harm caused by a suspension can still be avoided—*i.e.*, either before or immediately after suspension." 443 U.S. 74 (Brennan, J., concurring in

part). The defendant's proposed schedule for disposition in this case would not provide Mallen with a meaningful opportunity for full hearing and determination since the result in his criminal trial will have been dispositive on the Section 1818(g) issues, before the FDIC's disposition is entered. Under the FDIC's proposed schedule, Mallen would incur the full penalty imposed prior to receiving a disposition, just as the horse trainer incurred in *Barchi.*

At the hearing, the FDIC cited *Laurido v. Simon,* 489 F.Supp. 1169 (S.D.N.Y. 1980) to support its position that the Court has authority to order an agency to shorten the deadlines for post-suspension disposition. Earlier in these proceedings, this Court may have considered a schedule for arriving at a disposition that is more prompt than that set forth in the statute, however until now, the FDIC has insisted on standing by the deadlines for disposition in Section 1818(g), and 12 CFR Section 308.61, and has not suggested it would willingly provide the constitutionally required prompt disposition. The Court believes that the FDIC's offer is a step in the right direction. However, in this Court's view, it came too late in this case, and the time it allows for the FDIC to arrive at a disposition is simply too lengthy in view of the short time left before the criminal trial commences.[2]

An additional reason for denying the amendment is that this Court believes it unfair to amend this Court's Order to allow the FDIC to suspend Mallen again and offer him an early hearing one week before his criminal trial. This is a

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[2] The FDIC suspended Mallen effective January 27, 1987, not until 48 days after the indictment was filed. This Court's Order enjoining the FDIC from enforcing the suspension order was entered February 17, 1987 11 days after this case was filed; seven days after the hearing. The Order was also transmitted to and received by the parties by facsimile machine February 17, 1987. The FDIC waited ten days after receipt of this Court's Order to file its Motion to Alter or Amend. The delay in this proceeding has been the fault of the FDIC, not the Court or the plaintiff.

time when Mallen should be preparing for the criminal case, not for a belated hearing under Section 1818(g).

II.

The FDIC contends in footnote 1 of its brief that a significant difference between the Section 1818(g) scheme and those decisions which have found other pre- or post-deprivation processes to be unconstitutional, is that the Section 1818(g) process only comes into play after an officer or director has been indicted. The FDIC asserts that this Court's previous Order failed to adequately weigh the effect of this independent judicial process involving grand jurors.[3] The FDIC argues that the indictment by an independent body followed by hearing and decision within 95 days provide plaintiffs a constitutionally sufficient level of due process. *See Merritt v. Marsh,* 791 F.2d 328 (4th Cir. 1986). *Merritt* was not a Section 1818(g) case. This precise issue regarding Section 1818(g) was raised by the FDIC in *Feinberg v. Federal Deposit Ins. Corp.,* 420 F.Supp. 109 (D.D.C. 1976), and rejected. In *Feinberg,* the Court stated:

> It appears arguable that if the issuance of a Notice and Order of Suspension were automatic upon the return of an indictment or the filing of an information or complaint, then there might not be a need for a hearing or other incidents of due process. Such an argument could only retain its vitality though if there were no agency determination required prior to the issuance of the Notice and Order of Suspension. But this is not the case.

Id. at 116. (footnote omitted). In *Feinberg,* the Court then cited two areas in which the agency could exercise its discretion in suspending bank officers after the filing of an

[3] This issue was addressed to a limited degree on page 11 of this Court's February 17, 1987 Order.

indictment. First, the agency must decide if the crime charged is one "involving dishonesty or breach of trust". *Id.* at 117. Second, the statute interjects an element of discretion by providing that the agency "may" suspend an individual indicted of such a crime "*if* continued service or participation by the individual may [1] pose a threat to the interests of the bank's depositors or [2] may threaten to impair the public confidence in the bank". Section 1818(g)(1). (emphasis supplied). *Feinberg, supra,* 420 F.Supp. at 117-18. This Court concludes that unlike the regulation involved in *Merritt,* where the mere filing of an indictment for fraud was adequate to suspend bidding privileges on government contracts, the mere filing of the indictment here was insufficient under Section 1818(g)(1) to trigger a suspension.

IT IS THEREFORE ORDERED that the Motion to Alter and Amend filed February 27, 1987 is denied.

IT IS FURTHER ORDERED that upon review of the Court's previous Order of February 17, 1987, the cite on page 4 to 12 CFR Section 1261(h) is amended to reflect the citation of 12 CFR Section 308.61(h).

March 10, 1987

DONALD E. O'BRIEN

Donald E. O'Brien, Chief Judge
UNITED STATES DISTRICT COURT

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
CENTRAL DIVISION

No. 2C 87-3016

JAMES E. MALLEN, AND FARMERS STATE BANK, KANAWHA, IOWA PLAINTIFFS,

v.

FEDERAL DEPOSIT INSURANCE CORPORATION, DEFENDANT.

[FILED MAR. 11, 1987]

ORDER

The Court has before it the Federal Deposit Insurance Corporation's (FDIC) Motion for Stay Pending Appeal to the United States Supreme Court filed March 10, 1987. After fully considering the motion, the Court denies it as it applies to the plaintiffs in this case.

The FDIC asserts that under 28 U.S.C. Section 1252 and 2101(a) it has recommended to the Solicitor General of the United States that it be allowed to directly appeal this Court's ruling regarding the unconstitutionality of 12 U.S.C. Section 1818(g). On March 11, 1987, the FDIC filed a Notice of Appeal to the United States Supreme Court. The FDIC requests that this Court suspend its order of February 17, 1987 pending disposition of its appeal so that it may suspend Plaintiff Mallen, pending a hearing, from participation in the affairs of the Farmers State Bank of Kanawha, Iowa, until criminal charges against Mr. Mallen are resolved.

The factors to be considered in granting a stay pending appeal in the Eighth Circuit are essentially the same as those factors considered in granting preliminary injunctive relief. *Packard Elevator v. I.C.C.*, 782 F.2d 112, 115 (8th Cir. 1986); *see e.g. Dataphase Systems, Inc. v. C L Systems, Inc.*, 640 F.2d 109, 114 (8th Cir. 1981). A party seeking a stay pending appeal must show:

> (1) that it is likely to succeed on the merits; (2) that it will suffer irreparable injury unless the stay is granted; (3) that no substantial harm will come to other interested parties; and (4) that the stay will do no harm to the public interest.

Packard Elevator, supra, at 115, *quoting, James River Flood Control Ass'n v. Watt,* 680 F.2d 543, 544 (8th Cir. 1982) (per curiam). This Court has already found that the factors quoted above weigh in favor of the plaintiff, and therefore ordered preliminary injunctive relief. The Court is not inclined to reverse its previous findings in ruling on the Motion for Stay Pending Appeal.

While the rationale of the Court's previous rulings may have more far reaching effect than in this case alone, this Court's rulings are binding precedent only in the Northern District of Iowa. The FDIC has contended that this Court's previous rulings would irreparably harm it due to the potentially adverse effect on a safe and sound banking system. The Court agrees with the FDIC and Congress that there is merit to the policy of 12 U.S.C. Section 1818(g) allowing the FDIC to suspend a bank officer indicted for a crime involving dishonesty, or breach of trust where there may be a threat to the interests of the depositors or a threat of impairment of public confidence in a bank. However, the Court was persuaded in this case that the statute and regulations as applied to Mr. Mallen would not accord him due process. To the extent that this Court's rulings have an impact on other cases involving indicted bank officers, the Court shall enter a stay of its

rulings as to them, but denies the entry of a stay with regard to Mr. Mallen for the reasons mentioned in previous orders.[1]

IT IS THEREFORE ORDERED that the Motion for a Stay Pending Appeal to the United States Supreme Court is denied.

IT IS FURTHER ORDERED that a stay pending disposition of appeal is entered regarding any binding precedent this Court's Order of February 17, 1987 may have on cases involving other indicted bank officers, directors, or other persons participating in the affairs of any FDIC insured bank so as not to cause an adverse effect on a safe and sound banking system.

March 11, 1987

DONALD E. O'BRIEN

Donald E. O'Brien, Chief Judge
UNITED STATES DISTRICT COURT

[1] By entering a stay as to any similar cases, this Court is not suggesting that it will not consider other challenges to the statute if it is applied in an unconstitutional manner.

APPENDIX D

FEDERAL DEPOSIT INSURANCE CORPORATION
WASHINGTON, D.C.

FDIC-87-5g

IN THE MATTER OF
JAMES E. MALLEN, OFFICER AND DIRECTOR OF
FARMERS STATE BANK, KANAWHA, IOWA
(INSURED STATE NONMEMBER BANK)

NOTICE AND ORDER OF SUSPENSION AND PROHIBITION

It appearing to the Board of Directors ("Board") of the Federal Deposit Insurance Corporation ("FDIC") that James E. Mallen ("Respondent"), president and a director of Farmers State Bank, Kanawha, Iowa ("Bank"), has been charged in an indictment filed by the United States Attorney in the United States District Court for the Northern District of Iowa, on or about December 10, 1986, with the commission of, or participation in, crimes involving dishonesty or breach of trust punishable by imprisonment for a term exceeding one year, to wit: (1) misrepresentation or concealment of material facts in an Officer's Questionnaire (18 U.S.C. § 1001); and (2) misrepresentation or concealment of material facts in a personal financial statement for the purpose of influencing the action of the FDIC (18 U.S.C. § 1014).

It further appearing that continued service or participation by Respondent in the conduct of the affairs of the Bank may pose a threat to the interests of the Bank's depositors or may threaten to impair public confidence in the Bank.

After due consideration and resolution:

IT IS HEREBY ORDERED, pursuant to the provisions of section 8(g)(1) of the Federal Deposit Insurance Act ("Act"), 12 U.S.C. § 1818(g)(1), and sections 308.55 through 308.63 of the Rules of Practices and Procedures of the FDIC, 12 C.F.R. §§ 308.55-308.63, that Respondent be, and hereby is:

(1) Suspended as president and director of the Bank; and

(2) Prohibited from further participation in any manner in the conduct of the affairs of the Bank, or any other bank insured by the FDIC.

Pursuant to the provisions of section 8(g)(3) of the Act, 12 U.S.C. § 1818(g)(3), within 30 days from service of this NOTICE AND ORDER OF SUSPENSION AND PROHIBITION ("NOTICE"), Respondent may request in writing an opportunity to appear before the FDIC to show that his continued service to or participation in the conduct of the affairs of the Bank does not, or is not likely to, pose a threat to the interests of the Bank's depositors or threaten to impair public confidence in the Bank. Upon receipt of such a request, the FDIC will fix a time and place for hearing not later than 30 days from receipt of the request. The hearing will be conducted in the manner prescribed in 12 U.S.C. § 1818(g)(3).

Originals of all papers filed in this proceeding shall be served upon the Office of the Executive Secretary, 550 17th Street, N.W., Washington, D.C. 20429. Also, copies of all papers filed in this proceeding shall be served upon the Legal Division, Compliance and Enforcement Section, 550 17th Street, N.W., Washington, D.C. 20429, and upon the Regional Counsel, Bank Supervision, Kansas City Regional Office, 2345 Grand Avenue, Suite 1500, Kansas City, Missouri 64108.

The provisions of this NOTICE shall become effective upon service of this NOTICE, and shall remain effective

until terminated by the Board or until the final disposition of the said indictment.

By direction of the Board of Directors.

Dated at Washington, D.C., this 20th day of January, 1987.

/s/ HOYLE L. ROBINSON

Hoyle L. Robinson
Executive Secretary

(SEAL)

FDIC
Federal Deposit Insurance Corporation
Washington, DC 20429

Office of the Executive Secretary

January 20, 1987

CERTIFIED – RETURN RECEIPT REQUESTED

Mr. James E. Mallen
114 East 5th Street
Kanawha, Iowa 50447

Dear Mr. Mallen:

Subject: In the matter of
James E. Mallen
Farmers State Bank
Kanawha, Iowa
Docket No. FDIC-87-5g
Section 8(g) Suspension and Prohibition
Proceeding

Pursuant to the provisions of section 8(g) of the Federal Deposit Insurance Act ("Act"), the Board of Directors of the Federal Deposit Insurance Corporation ("FDIC") has today issued a Notice and Order of Suspension and Prohibition ("Notice") suspending you as president and a director of Farmers State Bank, Kanawha, Iowa ("Bank"), and prohibiting you from further participation in any manner in the conduct of the affairs of the Bank or any other bank insured by the FDIC.

Section 8(g) authorizes the FDIC to suspend from office and/or prohibit from further participation in any manner in the conduct of the affairs of an insured State bank

which is not a member of the Federal Reserve System any director, officer, or other person participating in the conduct of the affairs of the bank, whenever the director, officer or participant is charged in any information, indictment or complaint authorized by a United States attorney with the commission of or participation in a crime involving dishonesty or breach of trust which is punishable by imprisonment for a term exceeding one year. The indictment upon which the enclosed Notice is based was handed down against you on or about December 10, 1986, in the United States District Court for the Northern District of Iowa.

The suspension and prohibition shall remain in effect until the indictment is finally disposed of or until terminated by the FDIC.

Your attention is directed to section 8(j) of the Act, which imposes criminal penalties of up to one year's imprisonment and a fine of up to $5,000 upon any person against whom there is outstanding and effective any notice or order under section 8(g) of the Act "who (1) participates in any manner in the conduct of the affairs of the bank involved, or directly or indirectly solicits or procures, or transfers or attempts to transfer, or votes or attempts to vote, any proxies, consents, or authorizations in respect of any voting rights in such bank, or (ii) without the *prior written approval* of the appropriate Federal banking agency votes for a director, serves or acts as a director, officer, or employee of *any* bank [emphasis added]."

Within 30 days from receipt of the Notice you may file with the Executive Secretary, FDIC, 550 - 17th Street, N.W., Washington, D. C., a written request for a hearing at which time you may present evidence and argument as to why the suspension and prohibition should not continue in effect. Your request should state the relief desired and the grounds therefor and furnish any available supporting

evidence. The proceeding will be governed by Subpart G of Part 308 of FDIC's Rules and Regulations (12 C.F.R. Part 308, Subpart G). In particular, section 308.56 sets out the relevant considerations, and section 308.61 sets out the hearing procedures.

Sincerely,

/s/ HOYLE L. ROBINSON
Hoyle L. Robinson
Executive Secretary

Enclosures

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF IOWA

No. C 87-3016

JAMES E. MALLEN, ET. AL., PLAINTIFFS,

v.

FEDERAL DEPOSIT INSURANCE CORPORATION, DEFENDANT.

[FILED MAR. 11, 1987]

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that the Federal Deposit Insurance Corporation, the defendent above-named, hereby appeals to the Supreme Court of the United States from the February 17, 1987 order of the district court enjoining defendant from enforcing its "Notice and Order of Suspension and Prohibition" which was served on Plaintiff James E. Mallen, and from the March 10, 1987 order of the district court denying defendant's motion to alter or amend the judgment.

This appeal is taken pursuant to 28 U.S.C. § 1252.

Respectfully submitted,

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MOTION

Supreme Court, U.S.
FILED
SEP 25 1987
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CLERK

No. 87-82

In the Supreme Court of the United States

October Term, 1987

FEDERAL DEPOSIT INSURANCE CORPORATION, APPELLANT

vs.

JAMES E. MALLEN, ET AL., APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF IOWA

SUGGESTION OF MOOTNESS AND MOTION TO DISMISS

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In the Supreme Court of the United States

October Term, 1987

No. 87-82

FEDERAL DEPOSIT INSURANCE CORPORATION, APPELLANT

v.

JAMES E. MALLEN, ET AL., APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF IOWA

SUGGESTION OF MOOTNESS AND MOTION TO DISMISS

STATEMENT

1. The Federal Deposit Insurance Corporation (the FDIC) filed a direct appeal with this Court, pursuant to 28 U.S.C. 1252, from an order of the United States District Court for the Northern District of Iowa which concluded that 12 U.S.C. 1818(g) violated the Fifth Amendment of the United States Constitution, and preliminarily enjoined the FDIC from enforcing a Notice and Order of Suspension and Prohibition against appellee Mallen (No. C87-3016 (N.D. Iowa February 17, 1987)).

Since the docketing of the appeal before or on July 9, 1987, certain events have occurred which render this case moot.

2. Appellee Mallen was the president and director of appellee Farmers State Bank, Kanawha, Iowa (the Bank). Mallen held those offices beginning in 1976. He owns 1,320 shares, a 26% interest, in Kanawha Investment Holding

Company. Kanawha Investment Holding Company exists as a one-bank holding company. It controlled 92% of all stock issued by Farmers State Bank. Mallen does not own stock or voting rights in any other bank or bank holding company. He is not associated with any other bank or bank holding company.

3. Mallen was indicted by a federal grand jury in December 1986.[1] Following his indictment the FDIC served a Notice and Order of Suspension and Prohibition (Notice and Order) pursuant to 12 U.S.C. 1818(g) on Mallen, with a copy to the Bank (*J.S., App. D). The Notice and Order suspended Mallen as president and director of the Bank and prohibited him from further participation in any manner in the conduct of the affairs of the Bank.

Farmers State Bank and Mallen brought this action to challenge the Notice and Order. The Bank and Mallen challenged his removal from the Bank without a prompt post-suspension hearing with oral evidence and a timely decision following that hearing. On February 17, 1987, the district court concluded that the post-suspension procedures provided by 12 U.S.C. 1818(g) violated due process and preliminary enjoined the enforcement of the Notice and Order (J.S. App. A). The FDIC did not proceed to trial in the district court on the issue of a permanent injunction but chose instead to file this appeal.

4. On March 24, 1987, following Mallen's criminal trial, a jury found Mallen guilty on both counts of the indictment. Subsequently, the district court judge who presided over the criminal trial dismissed one count, and sentenced Mallen on the other count (Cr. No. 86-3017 (N.D. Iowa, May 1, 1987)).

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[1]The acts which formed the basis for the indictment were performed in 1982. The FDIC had complete knowledge of these acts in 1983 because the transactions were described and detailed in the Bank's Reports of Examination submitted to the FDIC at that time.

*J.S., App. (Jurisdictional Statement, Appendix)

Mallen has completed serving his prison sentence and currently is on probation for three years.

Cross appeals regarding this criminal matter were filed with the United States Court of Appeals for the Eighth Circuit (Nos. 87-1590 and 87-1722). The final brief was due on September 21, 1987 and that court soon will determine whether oral argument is necessary and if so, schedule the argument.

5. Following Mallen's conviction, the FDIC moved for and obtained a preliminary injunction pursuant to 12 U.S.C. 1829 enjoining Mallen from serving as a director, officer, or employee of the Bank (No. C-87-3053 (N.D. Iowa)). Neither Mallen nor Farmers State Bank have appealed that order.

6. The Bank was closed by Order of the Superintendent of Banking of the State of Iowa (Equity No. 15,860 (Hancock County, Iowa District Court)) and was placed into receivership on July 30, 1987 (Equity No. 15,861 (Hancock County, Iowa District Court)).[2] The FDIC was appointed receiver and has been conducting the affairs of Farmers State Bank since that date. It sold the Bank to First National Bank of Clarion and the bank building which formerly housed Farmers State Bank now serves as the Kanawha, Iowa branch of the First National Bank of Clarion. Mallen has absolutely no connection with that bank. Due to the receivership and subsequent sale of the Bank, Kanawha Investment Holding Company is unable to vote its shares in Farmers State Bank or participate in the affairs of the Bank.

7. At the time Mallen challenged the constitutionality of the Notice and Order, Mallen had a real interest in the outcome of this action. At that time, he had been indicted, but had not been convicted of any criminal charges. The only bank in which Mallen had any interest, Farmers State Bank, was an ongoing banking business of which he was an officer, director and employee. In contrast, Mallen now has been

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[2]Farmers State Bank has filed an appeal of the orders closing the Bank and appointing the receiver. Briefs have not yet been filed in that appeal.

convicted of a federal felony. He has served time in prison and is on three years' probation. Mallen no longer is an officer or director of the Bank and is unemployed. The Bank is in receivership and its assets have been sold. Neither Mallen nor Kanawha Investment Holding Company are able to participate in or exercise any control over the affairs of the Bank.

Since there is no longer any real controversy, Mallen has no personal interest in the case and has not authorized his attorneys to contest this appeal. Mallen has directed counsel only to inform the Court of the facts relating to mootness and to request the Court to dismiss the appeal. Furthermore, in the proceedings before the district court, the undersigned counsel represented the Farmers State Bank which now is controlled by the FDIC as receiver. The FDIC has not authorized undersigned counsel to appear on behalf of the current Farmers State Bank in this appeal.

THIS CASE IS MOOT AND SHOULD BE DISMISSED

Appellee Mallen respectfully requests this Court to dismiss this appeal because circumstances have changed so that there is no longer the continuing existence of a controversy. Mallen currently is subject to an effective order pursuant to 12 U.S.C. 1829 which prohibits him from serving as an officer, director or employee in any insured bank.[3] The FDIC asserts that this Section 1829 order is not nearly as broad as a Section 1818(g) order which also would prohibit Mallen from voting his stock in the holding company, i.e., voting less than a 25% interest in the Bank (J.S. at 12–13). Given the FDIC's receivership and sale of the Bank which is the subject of the

[3]Section 1829 provides that "no person shall serve as a director, officer or employee of an insured bank who has been convicted. . . of any criminal offense involving dishonesty or breach of trust." 12 U.S.C. 1829.

Section 1818(g) order, any Section 1818(g) notice and order which would prohibit Mallen from participating in the Bank is meaningless.

The FDIC declined Mallen's request to withdraw the appeal voluntarily and suggested in conversations with Mallen's counsel that the case may not be moot notwithstanding the closing and sale of the Bank because an outstanding Section 1818(g) order arguably could also be used to prevent Mallen from voting for directors of another bank pursuant to 12 U.S.C. 1818(j). Section 1818(j) imposes criminal penalties upon any person against whom there is an outstanding and effective Section 1818(g) order who "without the prior written approval of the appropriate Federal banking agency votes for a director, serves or acts as a director, officer or employee of any bank."[4] Mallen already is barred by 12 U.S.C. 1829 from all of these activities except voting for directors of other banks. The Section 1818(j) penalty on voting for directors, however, exists only when there is an effective and outstanding Section 1818(g) notice and order.

Section 1818(g) orders may not be issued as a generalized prohibition against participation in the banking business

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[4]The full text of Section 1818(j) provides:

> Any director or officer, or former director or officer of an insured bank, or any other person, against whom there is outstanding and effective any notice or order (which is an order which has become final) served upon such director, officer, or other person under subsections (e)(4), (e)(5), or (g) of this section, and who (i) participates in any manner in the conduct of the affairs of the bank involved, or directly or indirectly solicits or procures, or transfers or attempts to transfer, or votes or attempts to vote, any proxies, consents, or authorizations in respect of any voting rights in such bank, or (ii) without the prior written approval of the appropriate Federal banking agency, votes for a director, serves or acts as a director, officer, or employee of any bank, shall upon conviction be fined not more than $5,000 or imprisoned for not more than one year, or both.

without reference to a particular bank. A Section 1818(g) notice and order issues to both the individual and the bank at which the individual is an officer or director and prohibits the officer or director from participating in the affairs of that particular bank. *See Anonymous v. Federal Deposit Ins. Co.*, 619 F. Supp. 866, 869-70 (D.C.D.C. 1985) (discusses analogous limitation in 12 U.S.C. 1818(e)). Issuance of an outstanding and effective Section 1818(g) order requires the existence of the particular bank and the present service or participation in the affairs of that particular bank by the individual named in the notice and order. In this case, the Bank for all practical purposes no longer exists and Mallen does not serve or participate in any way in the affairs of the Bank. A Section 1818(g) order would, in effect, require the FDIC to serve a notice and order on itself prohibiting Mallen from participating with the FDIC in the affairs of the unsold portions, if any, of the former Farmers State Bank. Under the present facts, no effective and outstanding Section 1818(g) notice and order can be issued to the Bank and Mallen. Without an underlying outstanding 1818(g) notice and order, Section 1818(j) simply is not operative.

Even if one assumes that Section 1818(j) does not require an effective and outstanding Section 1818(g) order against the Bank and Mallen, there is no basis for finding the existence of a continuing case or controversy arising out of Mallen's theoretical potential of voting for directors in any other bank. Mallen has no stock or voting rights of any kind in any other bank or bank holding company. He is unemployed and is in no position to purchase voting rights in any bank or bank holding company. The hypothetical possibility that Mallen conceivably could purchase voting rights in another bank is insufficient to support the continuing existence of an actual controversy with regard to the Section 1818(g) Notice and Order directed at Mallen and the Bank. "'[S]peculative contingencies afford no basis for our passing on the substan-

tive issues [the petitioner] would have us decide' in the absence of 'evidence that this is a prospect of immediacy and reality.'" *Tiverton Bd. of License Comm'rs v. Pastore,* 469 U.S. 238, 240 (1985), *quoting DeFunis v. Odegaard,* 416 U.S. 312, 320 n.5 (1974) (citations omitted). Nor is there any reasonable expectation or demonstrated probability that the same controversy will recur involving the same complaining party. *Weinstein v. Bradford,* 423 U.S. 147, 149 (1975); *Murphy v. Hunt,* 455 U.S. 478 (1982).

Even if one assumes the current existence of an actual controversy, determination of the currently pending criminal appeals will moot any such continuing controversy since conviction or acquittal on the indictment would terminate the Section 1818(g) order served on Mallen and the Bank. "Such suspension or prohibition shall remain in effect until such. . . indictment. . . is fully disposed of." 12 U.S.C. 1818(g)(1). Given Mallen's complete nonparticipation in any bank and the dispositive effect of the criminal appeals, further proceedings in this Court should, at a minimum, be stayed until the criminal appeals are finally resolved.

CONCLUSION

The issues sought to be raised are moot and appellee Mallen respectfully requests that the appeal be dismissed on that ground. In the event this Court determines not to dismiss the appeal at the present time, appellee Mallen respectfully requests any further proceedings in this appeal be stayed until the criminal appeals are finally resolved.

Respectfully submitted.

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REPLY BRIEF

Supreme Court, U.S.
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No. 87-82

In the Supreme Court of the United States

OCTOBER TERM, 1987

FEDERAL DEPOSIT INSURANCE CORPORATION, APPELLANT

v.

JAMES E. MALLEN, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF IOWA

REPLY MEMORANDUM FOR THE APPELLANT

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In the Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-82

FEDERAL DEPOSIT INSURANCE CORPORATION, APPELLANT

v.

JAMES E. MALLEN, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF IOWA

REPLY MEMORANDUM FOR THE APPELLANT

Appellee Mallen has moved to dismiss the appeal as moot. We believe that the case is not now technically moot, but we agree that it has very limited practical consequences for the parties and that it will be moot when Mallen's criminal conviction, now on appeal to the Court of Appeals for the Eighth Circuit, is "finally disposed of" (12 U.S.C. 1818(g)(1)). Accordingly, we suggest that the Court may wish to defer consideration of the appeal until that court of appeals has entered judgment on the pending appeal in the criminal case; we will advise the Court of any pertinent developments in that case. If and when the Court dismisses the present appeal as moot, it would be appropriate to vacate the district court's judgment and remand this case to the district court with instructions to dismiss (see *United States* v. *Munsingwear, Inc.*, 340 U.S. 36 (1950)).

1. As recited in our jurisdictional statement, on December 10, 1986, a federal grand jury for the Northern District of Iowa indicted Mallen for felony violations of 18 U.S.C. 1014 and 18 U.S.C. 1001. The Federal Deposit Insurance Corporation (FDIC) then issued a Notice and

Order of Suspension pursuant to 12 U.S.C. 1818(g)(1), suspending Mallen as President and a Director of Farmers State Bank of Kanawha, Iowa (the Bank), and prohibiting him from participating in the affairs of the Bank. The district court enjoined the FDIC from enforcing the Notice and Order of Suspension against Mallen, and this appeal was taken.

On March 24, 1987, a jury convicted Mallen on both counts of the indictment. On May 1, the district court sentenced Mallen on the second count to three years' imprisonment, suspended all but 60 days, and fined him $10,000. The court set aside the first count, finding the indictment defective. Mallen's appeal of his conviction and the Government's cross appeal on the first count are pending in the United States Court of Appeals for the Eighth Circuit (Nos. 87-1590 and 87-1722). Briefing has been completed and the court of appeals is now determining whether to hear oral argument in the case. Mallen has served his prison sentence and is currently on probation.

On July 30, 1987, after the jurisdictional statement was filed, the Iowa Superintendent of Banking closed the Bank and placed it in receivership. The FDIC was appointed receiver and immediately executed a "purchase and assumption" transaction under which First National Bank of Clarion, Iowa, assumed the depositor liabilities of the Bank. The Bank's former office is now a branch of First National Bank of Clarion.

2. This case is not now moot. Under Section 1818(g)(1), the Notice and Order of Suspension "remain[s] in effect until [Mallen's] * * * indictment * * * is finally disposed of," *i.e.*, until the appellate process is completed (see J.S. 18). Although, by virtue of 12 U.S.C. 1829, Mallen's conviction already prevents Mallen from serving as a director, officer or employee of the Bank or any other

insured bank,[1] and the apparently permanent closing of the Bank moots any question of other participation in the Bank's affairs,[2] the Notice and Order of Suspension would, if reinstated as a result of this appeal, have some, albeit comparatively minor, continuing collateral consequences: 12 U.S.C. 1818(j) (emphasis added) provides that any person against whom there is outstanding any such order under Section 1818(g) may not, inter alia, "vote[] for a director" or "serve[] or act[] as a[n] * * * employee of *any* bank," including a non-insured bank; reinstatement of the Notice and Order would therefore bar Mallen from engaging in these activities prior to the termination of the criminal case.

Mallen argues that this case is nevertheless moot because (i) a Notice and Order of Suspension cannot remain outstanding and effective when the bank with respect to which it is issued "for all practical purposes no longer exists" (Motion to Dismiss 6) and (ii) Mallen has no present prospects of employment by any other bank or of voting stock in any other bank (*id.* at 6-7). As to the first point, the Notice and Order of Suspension was issued before the Bank was placed in receivership and according to the statute remains in effect until the criminal proceedings are "finally disposed of"; there is no reason why a

[1] As noted in the jurisdictional statement (at 12-13), under 12 U.S.C. 1829, an individual who has been convicted of a crime involving "dishonesty or a breach of trust" may not serve as an officer, director or employee of a bank insured by the FDIC unless the FDIC consents in writing. After Mallen's conviction, the FDIC obtained a preliminary injunction restraining Mallen from serving as an officer or director of the Bank (No. C-87-3053 (N.D. Iowa)). No further proceedings have been scheduled in that case and Mallen has not appealed the injunction.

[2] As Mallen notes (Motion to Dismiss 3 n.2), the order placing the Bank in receivership has been appealed to the Iowa courts. The possibility that the Bank would be returned to its former owners before Mallen's criminal conviction is finally adjudicated thus cannot be logically ruled out.

suspension order, once validly issued, should not remain in effect, with whatever direct and collateral consequences it may have, until then. As to the second point, Mallen's representation that he has no present prospects of employment by any other (non-insured) bank or of voting stock in any other bank does not demonstrate that he would not do so in the future were he not barred by the Notice and Order and Section 1818(j).

3. While this case is not now moot, the final disposition of Mallen's criminal proceeding will moot it, because under Section 1818(g)(1) the Notice and Order of Suspension will no longer remain in effect.[3] That can be expected to occur within a short time, in all probability before this Court could hear and decide the present case. We therefore suggest that the Court may wish to defer consideration of the appeal; we will advise the Court of any pertinent developments in the criminal case. When the criminal case is finally disposed of, it will presumably be appropriate to treat the present case as moot.[4]

4. If and when this case is determined to be moot the judgment of the district court should not be allowed to stand. That judgment held unconstitutional an Act of Congress that grants the federal banking agencies an important power. The FDIC, absent mootness, would be entitled to review of that judgment in this Court under 28 U.S.C. 1252. Upon a determination of mootness, it would

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[3] When an indictment that has led to a suspension is resolved by a final conviction or acquittal, the suspension terminates, but if the final outcome is conviction Section 1818(g) authorizes the FDIC to issue an Order of Removal.

[4] Mallen was the largest shareholder of the holding company that owned 92% of the stock of the Bank. Had the Bank not been closed after the jurisdictional statement was filed, this case would be of considerably more practical importance than it is now. While the Bank was still open the Notice and Order of Suspension kept Mallen from voting his shares in the holding company, something that 12 U.S.C. 1829 did not do even after Mallen was convicted (see J.S. 12-13).

be appropriate to vacate the judgment below and remand to the district court with instructions to dismiss the case as moot (see *United States* v. *Munsingwear, Inc.*, 340 U.S. 36 (1950)).

Respectfully submitted.

CHARLES FRIED
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OCTOBER 1987

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JOINT APPENDIX

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No. 87-82

In the Supreme Court of the United States

OCTOBER TERM, 1987

FEDERAL DEPOSIT INSURANCE CORPORATION, APPELLANT

v.

JAMES E. MALLEN

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF IOWA

JOINT APPENDIX

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JURISDICTIONAL STATEMENT FILED JULY 9, 1987
PROBABLE JURISDICTION NOTED OCTOBER 19, 1987

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UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA

JAMES E. MALLEN, ET AL.

v.

FEDERAL DEPOSIT INSURANCE CORPORATION

Date	Proceedings
02.06.87	Complaint, Motion for Temporary Restraining Order and Motion for Preliminary Injunction filed
02.08.87	Affidavits in support of FDIC Opposition to Temporary Relief filed
02.09.87	Memorandum in Opposition to Motion for Temporary Restraining Order filed
02.10.87	Hearing held by District Court
02.17.87	District Court enters Order enjoining FDIC from enforcing the Notice and Order of Suspension and Prohibition
02.26.87	FDIC Motion to Alter or Amend Judgment filed
03.05.87	Plaintiffs' Opposition to Motion to Alter or Amend Judgment filed
03.10.87	District Court enters Order denying Motion to Alter or Amend Judgment; FDIC Motion for Stay Pending Appeal filed; FDIC Notice of Appeal filed
03.11.87	District Court enters Order denying Motion for Stay Pending Appeal

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF IOWA

CIV. NO.

JAMES E. MALLEN AND FARMERS STATE BANK, KANAWHA, IOWA, PLAINTIFFS,

v.

FEDERAL DEPOSIT INSURANCE CORPORATION, DEFENDANT.

VERIFIED COMPLAINT

Plaintiffs state and allege for their cause of action as follows:

PARTIES

1. Plaintiff Farmers State Bank, Kanawha, Iowa ("Bank") is a small bank in an agricultural area of Iowa. It exists and does business under the laws of the State of Iowa and has its principal place of business at Kanawha, Iowa. The Bank has assets of approximately $18,000,000. Kanawha Investment Holding Company, a one bank holding company, owns ninety-two percent of the corporate stock of the Bank.

2. Plaintiff James E. Mallen ("Mallen") was the President of the Bank and served on the Bank's Board of Directors. He is the largest stockholder in Kanawha Investment Holding Company ("Kanawha Investment"), and serves on its Board of Directors.

3. Defendant Federal Deposit Insurance Corporation ("FDIC") is an agency of the United States government.

JURISDICTION AND VENUE

4. This Court has jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1346.

5. Venue is based on 28 U.S.C. § 1391(e).

COUNT I

6. Mallen became president of the Bank in 1969, and held that position continuously until January 26, 1987.

7. On May 20, 1986 the FDIC issued a Notice of Intention to Remove from Office and to Prohibit from Farther Participation ("Notice of Intention"). This Notice of Intention was issued pursuant to Section 8(e) of the Federal Deposit Insurance Act ("Act"), 12 U.S.C.§ 1818(e).

8. The 1986 Notice of Intention was based in large part on two groups of documents signed by Mr. Mallen in 1982. The first allegation dealt with the characterization in several officer and director reports of loans made to various individuals whom the FDIC alleges were nominees for a real estate investment limited partnership – Elmwood Limited Partnership. The FDIC alleged that these loans should have been characterized and identified as "accommodation" loans. The second allegation was that Mr. Mallen understated his net worth by approximately 1½% of his total net worth on a personal financial statement provided to the Bank. It was not contended that this miniscule understatement had any effect on the granting or withholding of credit to Mr. Mallen.

9. Eleven days of administrative hearings were conducted before an administrative law judge in September and October, 1986 in connection with the allegations contained in the FDIC Notice of Intention. No decision was rendered since the administrative law judge recused himself and the hearing was not concluded. Testimony established that Mr. Mallen's financial statement was accurate and did not understate his net worth. The evidence

also established that the individuals named on the loans were, in fact, the debtors on the promissory notes to the Bank and had individually repaid the loans. The evidence also established that FDIC employees themselves did not agree on the proper definition of "accommodation" loans.

10. Despite authority under 12 U.S.C. § 1818(e)(4) to suspend a bank officer immediately if "deemed necessary for the protection of the bank or its depositors," the FDIC never served a notice of suspension under 12 U.S.C. § 1818(e)(4) at any time from the commencement of the Section (e) proceeding on May 20, 1986 through the date of this Complaint.

11. On or about December 10, 1986, a federal grand jury issued an indictment on these same grounds. The indictment charges Mallen with misrepresentation or concealment of material facts in a January 15, 1982 personal financial statement and misrepresentation or concealment of material facts in an Officer's Questionnaire. The criminal trial is scheduled to commence on March 16, 1987.

12. Mallen has vehemently denied these allegations continuously since they were first leveled at him.

13. Almost two months after the issuance of the indictment and eight months after the issuance of the Notice of Intention the Board of Directors of the FDIC issued a Notice and Order of Suspension and Prohibition ("Suspension Order") pursuant to Section 8(g) of the Act, 12 U.S.C. § 1818(g) on January 20, 1987. By this Suspension Order, the FDIC, on an ex parte basis, immediately suspended Mallen as president and director of the Bank and immediately prohibited him from further participation in any manner in the conduct of the affairs of the Bank.

12. The FDIC issued its Suspension Order without a hearing. The FDIC failed to state on what evidence it based its immediate suspension order and failed to state any specific factual grounds for the order.

13. The FDIC has taken the extraordinary action of ordering Mallen's immediate suspension as president and director of the Bank and immediate prohibition from participation in any manner in the affairs of the Bank without prior notice and without hearing even though:

(i) the FDIC has known about Mallen's alleged harmful conduct since before it issued the May 20, 1986 Notice of Intention;

(ii) the allegations in the December 10, 1986 indictment are identical to the allegations contained in May 20, 1986 Notice of Intention; and

(iii) the FDIC has not attempted to exercise its power for immediate suspension based on this conduct at any time since May 20, 1986 under 12 U.S.C. § 1818(e)(4).

14. Mallen and the Bank have demanded an immediate hearing regarding the propriety of the FDIC's Section 8(g) Order suspending Mallen and prohibiting him from participating in the affairs of the Bank. Given the gravity of deprivation of liberty and property interests of plaintiffs, plaintiffs have repeatedly demanded that a full administrative hearing be conducted immediately. The FDIC has, to date, refused to schedule an immediate hearing in accordance with Mallen's request. The FDIC has indicated that it will attempt to comply with 12 U.S.C. § 1818(g) which permits the FDIC to take up to 90 days to issue its decision on its reconsideration of the Suspension Order. Procedure followed by the FDIC would not result in any post-deprivation reconsideration until long after the conclusion of the criminal trial currently scheduled to commence on March 16, 1987.

15. In the intervening weeks, Mallen and the Bank are deprived of significant liberty and property interests without any hearing or judicial review.

16. Mr. Mallen is being deprived of his livelihood and is prohibited from pursuing the only career he has followed in the last 27 years. The Suspension Order also purportedly precludes him from exercising any of his ownership rights as the largest shareholder in the holding company that holds the bank. He is also prohibited from protecting his significant investment through overseeing continued proper operation of the Bank.

17. The Bank also is being harmed. The Suspension Order bars the Bank from employing and obtaining the benefits of its key officer. As President, Mallen supervised all employees. He was one of three loan officers with the Bank. Most of his time was spent meeting with Bank customers regarding the financing of their businesses. Through Spring, 1987, farmer customers of the Bank will be meeting with the Bank's loan officers to plan their income and expenses for the 1987 crop year and to arrange financing for their business needs. The Notice and Order precludes Mallen from participating in this important business of the Bank.

18. The indictment against Mallen has received wide publicity in northern Iowa. Many customers of the Bank are aware of the indictment and the Notice of Intention seeking to remove Mallen as an officer of the Bank. Despite this common public knowledge, there has been no run on the Bank against deposits.

19. In issuing the 8(g) Suspension Order, the FDIC has exceeded its authority under the Act in that there is no evidence that there is any threat to the interests of the Bank's depositors or that there is a threat or impairment to the public confidence in the Bank.

20. The Suspension Order as promulgated and enforced pursuant to Section 8(g) of the Act constitute a substantial deprivation of Mallen's property without due process of law in violation of the Fifth Amendment of the United States Constitution.

21. The Suspension Order as promulgated and enforced pursuant to Section 8(g) of the Act constitute a substantial deprivation of the Bank's property without due process of law in violation of the Fifth Amendment of the United States Constitution.

22. The Suspension Order as promulgated and enforced pursuant to Section 8(g) of the Act constitute a substantial deprivation of Mallen's liberty without due process of law in violation of the Fifth Amendment of the United States Constitution.

23. Section 8(g) of the Act violates due process of law under the Fifth Amendment of the United States Constitution, on its face as applied, because it does not provide for judicial review of the FDIC's Notice and Order of Suspension and Prohibition.

24. Section 8(g) of the Act violates due process of law under the Fifth Amendment of the United States Constitution, on its face and as applied, because it does not provide for an adequate and immediate post-deprivation hearing on the FDIC's Notice of Order of Suspension and Prohibition.

25. As a result of the Notice of Order of Suspension and Prohibition and of the denial of due process of law, plaintiff's have already suffered and will continue to suffer irreparable injury for which there is no adequate remedy at law.

COUNT II

26. Plaintiffs reallege the allegations of paragraphs 1 through 24.

26. Section 8(g) of the Act violates equal protection under the Fifth Amendment of the United States Constitution because it discriminates against those indicted for federal offenses, but not similar state law offenses.

WHEREFORE, plaintiffs pray:

1. That Section 8(g) of the Act be declared invalid, unlawful and in violation of the Fifth Amendment of the United States Constitution because the FDIC's application of the Act to the facts of this case violates plaintiffs' right to due process.

2. That Section 8(g) of the Act be declared invalid, unlawful and in violation of the Fifth Amendment of the United States Constitution, on its face and as applied, because the Act fails to require adequate and immediate post-deprivation hearing and judicial review thereby depriving plaintiffs of their property and liberty without due process of law.

3. That Section 8(g) of the Act be declared invalid, unlawful and in violation of the Fifth Amendment of the United States Constitution, on its face and as applied, because it denies equal protection of the laws to persons indicted on federal charges rather than state laws.

4. An Order declaring the January 20, 1987 Suspension Order null and void, enjoining the FDIC from any attempt to enforce said Suspension Order and declaring Mallen eligible to continue as an officer of the Bank and to participate in the Bank's affairs.

5. An Order enjoining defendant from issuing another Notice and Order of Suspension and Prohibition pursuant to Section 8(g) of the Act directed to Mallen based on the December 10, 1986 indictment prior to completion of the criminal trial schedule for March 16, 1987.

6. Awarding plaintiffs their costs, expenses and attorneys' fees.

7. Such other relief as the Court deems appropriate.

Dated: February 6, 1987 HILL & SIEGRIST

/s/ DAVID J. SIEGRIST

David J. Siegrist
P.O. Box 265
Britt, Iowa 50423
(515) 843-4451

LINDQUIST & VENNUM

/s/ JAMES P. MCCARTHY

James P. McCarthy
4200 IDS Center
80 South Eighth Street
Minneapolis, MN 55402
(612) 371-3211

ATTORNEYS FOR JAMES E. MALLEN AND FARMERS STATE BANK, KANAWHA, IOWA

VERIFICATION

James E. Mallen, being duly sworn, states that he is one of the plaintiffs in this action, that he has read the Complaint and that, to the best of his information and belief, all of the allegations contained in the Complaint are true and correct as of this date.

James E. Mallen

_____ being duly sworn, states that he is _____ of Farmer's State Bank, Kanawha, Iowa, one of the plaintiffs in this action, that he has read the Complaint and that, to the best of his information and belief, all of the allegations contained in the Complaint are true and correct as of this date.

FARMER'S STATE BANK,
KANAWHA

By _____

Its _____

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA

_____

Court File No. C87-4013

JAMES E. MALLEN AND FARMERS STATE BANK,
KANAWHA, IOWA, PLAINTIFFS,

v.

FEDERAL DEPOSIT INSURANCE CORPORATION, DEFENDANTS.

_____

AFFIDAVIT OF JAMES P. McCARTHY

COUNTY OF HENNEPIN)
) ss.
STATE OF MINNESOTA)

James P. McCarthy being duly sworn states as follows:

1. I am an attorney licensed to practice in the State of Minnesota and am admitted to practice before the United States District Court for the District of Minnesota and the Eighth Circuit Court of Appeals. I am counsel for plaintiffs James E. Mallen and Farmers State Bank, Kanawha, Iowa in the above-entitled action. David J. Siegrist of the law firm of Hill & Siegrist of Britt, Iowa is co-counsel in this action.

2. Attached as Exhibit No. 1 is a copy of an indictment dated December 10, 1986, naming James E. Mallen as a defendant.

3. On or about Monday, January 26, 1987, James E. Mallen received a copy of the Notice and Order of Suspension and Prohibition dated January 20, 1987. A copy of this notice and order is attached as Exhibit No. 2. With the notice was correspondence to Mr. Mallen from Hoyle L. Robinson, Executive Secretary of the FDIC attached hereto as Exhibit No. 3.

4. Neither the Notice and Order nor the correspondence from Mr. Hoyle set forth any factual grounds for the suspension and prohibition other than the bald recitation of the statute that "continued service to or participation in the conduct of the affairs of the bank may pose a threat to the interests of the Bank's depositors or may threaten to impair public confidence in the Bank."

5. Neither Mr. Mallen nor Farmers State Bank, Kanawha, Iowa ("Bank"), have been given an opportunity to present any evidence or argument to the FDIC concerning the issuance of the order.

6. The FDIC has not provided any immediate post-deprivation hearing for Mr. Mallen following the January 26, 1987 suspension and prohibition of Mr. Mallen's livelihood and career.

7. On January 30, 1987, I wrote to Hoyle L. Robinson, Executive Secretary of the FDIC demanding an immediate administrative hearing with both oral testimony and written evidence. A copy of this letter is attached as Exhibit No. 4.

8. In response to my January 30, 1987 letter, I received correspondence from the Deputy Executive Secretary, dated February 4, 1987, indicating that a hearing would be held within thirty days of Mr. Mallen's request before Mr. Richard White, a former administrative law judge. A copy of this letter is attached as Exhibit No. 5.

9. I also received a copy of correspondence from a regional counsel of the FDIC, Gerald F. Lamberti to Hoyle L. Robinson and myself dated February 2, 1987. Regional Counsel took the position that the hearing should simply be an informal hearing held no sooner than February 25, 1987. A copy of this letter is attached as Exhibit 6.

10. On February 5, 1987, I again telecopied correspondence to the Executive Secretary of the FDIC demanding that a hearing commence immediately and in no event

any later than Monday, February 9, 1987. I consented on behalf of Mr. Mallen and Farmers State Bank, Kanawha, to having Richard White serve as the hearing officer. A copy of this correspondence is attached as Exhibit No. 7.

11. As of Friday, February 6, 1987, neither Mr. Mallen nor his counsel had been informed of the scheduling of a hearing on Mr. Mallen's suspension and prohibition from any partipation in the Bank. Even if the FDIC conducts a full hearing with oral testimony, documentary evidence and argument, the agency may, under 12 U.S.C. § 1818(g), take up to sixty (60) days following the hearing to announce its decision. The FDIC has given no assurance that it will conduct an immediate hearing or that it will render its decision immediately. Under the position taken by the FDIC's regional counsel to date, it is probable that Mr. Mallen will not have any final post-deprivation hearing and determination prior to May, 1987. If the FDIC persists in its view of due process, Mr. Mallen will have been deprived of his entire livelihood and career by the United States government for over three months without any hearing and determination. Since the criminal trial on the indictment is scheduled to commence on March 16, 1987, Mr. Mallen will, in effect, have no post-deprivation hearing whatsoever.

12. On Friday, February 6, 1987, I called the FDIC Regional Counsel's office in Kansas City prior to the filing of the complaint in this action. I spoke with Assistant Regional Counsel Stephen Stiller. Mr. Stiller is familiar with the matter. I informed him that Mr. Mallen and Kanawha State Bank were filing a complaint and an application for temporary restraining order later in the afternoon. I informed Mr. Stiller that I was telecopying the pleadings that afternoon to his office and to the Washington D.C. Office of the Executive Secretary of the FDIC. I also indicated that I had requested time for a

temporary restraining order hearing before the Court on Tuesday, February 10, 1987. I also suggested that we attempt to hold a telephone conference with the Honorable Donald E. O'Brien later in the afternoon to discuss a scheduling.

/s/ JAMES P. McCARTHY
James P. McCarthy

Subscribed and sworn to
before me this 7th day
of February, 1987

/s/ J. MICHAEL DADY
Notary Public

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF IOWA

CR 86-3017

UNITED STATES OF AMERICA

v.

JAMES E. MALLEN

To: James E. Mallen
114 East Fifth St.
Kanawha, Iowa 50447

YOU ARE HEREBY SUMMONED to appear before the
☐ U.S. District Court or
☒ US. Magistrate at the time, date and place set forth below.

Place:
U.S. District Court
101 - 1st St. S.E.
Federal Bldg.
Cedar Rapids, Iowa

Room: 212

Date and Time:
Monday, December 22, 1986 at 9:30 A.M.

To answer a criminal ☒ Indictment ☐ Information
☐ Complaint: ☐ Violation Notice

Charging you with a violation of United States Code Title 18, section 1014, 1001

Description of offense:

False statement to bank; false statement to government

If you are financially unable to hire a lawyer, you are to contact the U.S. Magistrate, Rm. 212, U.S. Courthouse, Cedar Rapids, IA, for appointment of a lawyer at government expense under the Criminal Justice Act, by December 17, 1986. Telephone number (319) 399-2467. An affidavit of poverty must be attached.

Clerk of Court
WILLIAM J. KANAK

/s/ JOANN HARPER
Deputy Clerk

Date: December 11, 1986

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
CENTRAL DIVISION

No. CR 86-3017

UNITED STATES OF AMERICA, PLAINTIFF,

v.

JAMES E. MALLEN, DEFENDANT.

[Filed DEC 10, 1986]

INDICTMENT
18 U.S.C. § 1014 and 18 U.S.C. § 1001

The Grand Jury charges:

COUNT 1

On or about January 15, 1982, in the Northern District of Iowa, JAMES E. MALLEN knowingly did make a materially false statement in an Individual Financial Statement, Form No. 645 submitted by JAMES E. MALLEN on that date to the Farmers State Bank, Kanawha, Iowa, a bank insured by the Federal Deposit Insurance Corporation, for the purpose of influencing the action of the Federal Deposit Insurance Corporation, in that JAMES E. MALLEN did not disclose in the statement that he had a financial interest in Mallen Et. Al. or Elmwood Limited Partnership when, in truth and fact, as JAMES E. MALLEN well knew, he did have interests in such businesses.

This in violation of 18 U.S.C. § 1014.

COUNT 2

On or about November 22, 1982, in the Northern District of Iowa, JAMES E. MALLEN, in a matter within the jurisdiction of the Federal Deposit Insurance Corporation of the United States, wilfully and knowingly did falsify, conceal, and cover up by trick scheme or device a material fact, and did make a materially false, fictitious or fraudulent statement or representation, and did make and use a false writing or document knowing the same to contain a materially false, fictitious or fraudulent statement or entry, in that in an Officer's Questionnaire, Number 13152-1, Form FDIC 6300/34 (6-82) Defendant did not disclose an accommodation loan in the name of Carl Martin, dated November 13, 1981; accommodation loans in the names of William Dahl, Carl Martin and Robert and William Shipman, dated February 26, 1982; and an accommodation loan in the name of Robert and William Shipman, dated May 17, 1982, all made by the Farmers State Bank, Kanawha, Iowa, when in fact such accommodations loans had been made.

This in violation of 18 U.S.C. § 1001.

A TRUE BILL

/s/ GARY D. KRAUSE
Foreman

/s/ ROBERT L. TEIG
Robert L. Teig
Assistant United States Attorney

FEDERAL DEPOSIT INSURANCE CORPORATION
WASHINGTON, D.C.

FDIC-87-5g

IN THE MATTER OF JAMES E. MALLEN,

OFFICER AND DIRECTOR OF
FARMERS STATE BANK, KANAWHA, IOWA
(INSURED STATE NONMEMBER BANK)

NOTICE AND ORDER OF SUSPENSION AND PROHIBITION

It appearing to the Board of Directors ("Board") of the Federal Deposit Insurance Corporation ("FDIC") that James E. Mallen ("Respondent"), president and a director of Farmers State Bank, Kanawha, Iowa ("Bank"), has been charged in an indictment filed by the United States Attorney in the United States District Court for the Northern District of Iowa, on or about December 10, 1986, with the commission of, or participation in, crimes involving dishonesty or breach of trust punishable by imprisonment for a term exceeding one year, to wit: (1) misrepresentation or concealment of material facts in an Officer's Questionnaire (18 U.S.C. § 1001); and (2) misrepresentation or concealment of material facts in a personal financial statement for the purpose of influencing the action of the FDIC (18 U.S.C. § 1014).

It further appearing that continued service or participation by Respondent in the conduct of the affairs of the Bank may pose a threat to the interests of the Bank's depositors or may threaten to impair public confidence in the Bank.

After due consideration and resolution:

IT IS HEREBY ORDERED, pursuant to the provisions of section 8(g)(1) of the Federal Deposit Insurance Act ("Act"), 12 U.S.C. § 1818(g)(1), and sections 308.55

through 308.63 of the Rules of Practice and Procedures of the FDIC, 12 C.F.R. §§ 308.55-308.63, that Respondent be, and hereby is:

(1) Suspended as president and director of the Bank; and

(2) Prohibited from further participation in any manner in the conduct of the affairs of the Bank, or any other bank insured by the FDIC.

Pursuant to the provisions of section 8(g)(3) of the Act, 12 U.S.C. § 1818(g)(3), within 30 days from service of this NOTICE AND ORDER OF SUSPENSION AND PROHIBITION ("NOTICE"), Respondent may request in writing an opportunity to appear before the FDIC to show that his continued service to or participation in the conduct of the affairs of the Bank does not, or is not likely to, pose a threat to the interests of the Bank's depositors or threaten to impair public confidence in the Bank. Upon receipt of such a request, the FDIC will fix a time and place for hearing not later than 30 days from receipt of the request. The hearing will be conducted in the manner prescribed in 12 U.S.C. § 1818(g)(3).

Originals of all papers filed in this proceeding shall be served upon the Office of the Executive Secretary, 550 17th Street, N.W., Washington, D.C. 20429. Also, copies of all papers filed in this proceeding shall be served upon the Legal Division, Compliance and Enforcement Section, 550 17th Street, N.W., Washington, D.C. 20429, and upon the Regional Counsel, Bank Supervision, Kansas City Regional Office, 2345 Grand Avenue, Suite 1500, Kansas City, Missouri 64108.

The provisions of this NOTICE shall become effective upon service of this NOTICE, and shall remain effective until terminated by the Board or until the final disposition of the said indictment.

By direction of the Board of Directors.

Dated at Washington, D.C., this 20th day of January, 1987.

/s/ HOYLE L. ROBINSON

Hoyle L. Robinson
Executive Secretary

FDIC
Federal Deposit Insurance Corporation
2345 Grand Avenue, Suite 1500,
Kansas City, Missouri 64108
(816) 234-8000 Legal Division (Supervision)

January 20, 1987

CERTIFIED–RETURN RECEIPT REQUESTED

Mr. James E. Mallen
114 East 5th Street
Kanawha, Iowa 50447

Dear Mr. Mallen:

Subject: In the Matter of
James E. Mallen
Farmers State Bank
Kanawha, Iowa
Docket No: FDIC-87-5g
Section 8(g) Suspension and Prohibition Proceeding

Pursuant to the provisions of section 8(g) of the Federal Deposit Insurance Act ("Act"), the Board of Directors of the Federal Deposit Insurance Corporation ("FDIC") has today issued a Notice and Order of Suspension and Prohibition ("Notice") suspending you as president and a director of Farmers State Bank, Kanawha, Iowa ("Bank"), and prohibiting you from further participation in any manner in the conduct of the affairs of the Bank or any other bank insured by the FDIC.

Section 8(g) authorizes the FDIC to suspend from office and/or prohibit from further participation in any manner in the conduct of the affairs of an insured State bank which is not a member of the Federal Reserve System any director, officer, or other person participating in the con-

duct of the affairs of the bank, whenever the director, officer or participant is charged in any information, indictment, or complaint authorized by a United States attorney with the commission of or participation in a crime involving dishonesty or breach of trust which is punishable by imprisonment for a term exceeding one year. The indictment upon which the enclosed Notice is based was handed down against you on or about December 10, 1986, in the United States District Court for the Northern District of Iowa.

The suspension and prohibition shall remain in effect until the indictment is finally disposed of or until terminated by the FDIC.

Your attention is directed to section 8(j) of the Act, which imposes criminal penalties of up to one year's imprisonment and a fine of up to $5,000 upon any person against whom there is outstanding and effective any notice or order under section 8(g) of the Act "who (i) participates in any manner in the conduct of the affairs of the bank involved, or directly or indirectly solicits or procures, or transfers or attempts to transfer, or votes or attempts to vote, any proxies, consents, or authorizations in respect of any voting rights in such bank, or (ii) without the *prior written approval* of the appropriate Federal banking agency votes for a director, serves or acts as a director, officer, or employee of *any* bank [emphasis added]."

Within 30 days from receipt of the Notice you may file with the Executive Secretary, FDIC, 550-17th Street, N.W., Washington, D.C. a written request for a hearing at which time you may present evidence and argument as to why the suspension and prohibition should not continue in effect. Your request should state the relief desired and the grounds therefor and furnish any available supporting evidence. The proceeding will be governed by Subpart G of Part 308 of FDIC's Rules and Regulations (12 C.F.R.

Part 308, Subpart G). In particular, section 308.56 sets out the relevant considerations, and section 308.61 sets out the hearing procedures.

Sincerely,

/s/ HOYLE L. ROBINSON
Hoyle L. Robinson
Executive Secretary

Enclosures

LINDQUIST & VENNUM
4200 IDS CENTER
MINNEAPOLIS, MINNESOTA 55402-2205
TELEPHONE (612) 371-3211

January 30, 1987

Mr. Hoyle L. Robinson
Executive Secretary
Federal Deposit Insurance Corporation
550 - 17th Street N.W.
Washington, D.C. 20429

Legal Division, Compliance and
Enforcement Section
Federal Deposit Insurance Corporation
550 - 17th Street N.W.
Washington, D.C. 20429

VIA TELECOPY

Regional Counsel
Bank Supervision
Kansas City Regional Office
2345 Grand Avenue
Suite 1500
Kansas City, Missouri 64108

VIA FEDERAL EXPRESS

Re: In the Matter of James E. Mallen
Farmers State Bank, Kanawha, Iowa
Docket No.: FDIC - 87 - 5g
Section 8(g) Suspension and Prohibition
Proceeding

Dear Counsel and Mr. Robinson:

Our firm represents Mr. Mallen in connection with the above-referenced matter. On behalf of Mr. Mallen, we request an immediate administrative hearing with both oral testimony and written evidence regarding the Section 8(g) Suspension and Prohibition Proceeding. At this hearing, Mr. Mallen will present evidence that establishes that his continued service to or participation in the conduct of the affairs of the Bank does not, and is not likely to pose a threat to the interests of Bank's depositors or threaten to impair public confidence in the Bank. Not only is Mr. Mallen constitutionally entitled to an immediate oral hearing, the Federal Deposit Insurance Corporation ("FDIC") has, in fact, provided expedited hearings in the past.

Trial in the criminal matter is not scheduled to commence until March 16, 1987. Trial court resolution on the charge will not occur prior to April 1, 1987. The extended period of time which the FDIC intends to exclude Mr. Mallen from participation of the Bank has worked and will continue to work an extreme hardship upon Mr. Mallen and the Bank. There is absolutely no evidence to support any finding that his continued service or participation in the Bank will pose a threat to the interests of the Bank's depositors or impair public confidence in the Bank.

Given the gravity of the action taken by the FDIC, Mr. Mallen demands that such proceeding commence no later than Monday, February 9, 1987 in Iowa and that we be advised by telephone no later than Tuesday, February 3, 1987 whether you intend to conduct such a hearing.

We request that the Board of Directors of the FDIC immediately rescind its Order of Suspension and Prohibition suspending Mr. Mallen as president and director of Farmers State Bank, Kanawha, Iowa ("Bank") and pro-

hibiting Mr. Mallen from further participation in any manner in the conduct of the affairs of the Bank or any other bank insured by the FDIC.

Sincerely,

/s/ JAMES P. MCCARTHY
Mary E. Curtin
James P. McCarthy

JPMc:lmn
enclosure

FDIC
Federal Deposit Insurance Corporation
2345 Grand Avenue, Suite 1500,
Kansas City, Missouri 64108
(816) 234-8000 Legal Division (Supervision)

February 2, 1987

Mr. Hoyle L. Robinson
Executive Secretary
Federal Deposit Insurance Corporation
550 17th Street, N.W.
Washington, D.C. 20429

Mary E. Curtin, Esq.
James P. McCarthy, Esq.
Lindquist & Vennum
4200 IDS Center
Minneapolis, Minnesota 55402-2205

Re: In the Matter of James E. Mallen
Farmers State Bank, Kanawha, Iowa
Docket No: FDIC-87-5g
Section 8(g) Suspension and Prohibition Proceeding

Dear Mr. Robinson:

In a letter dated January 30, 1987, Respondent through his attorneys has requested a hearing with oral testimony in the subject case and has requested that any hearing be expedited to commence no later than February 9, 1987, in the State of Iowa. For the reasons stated below, we urge that no oral hearing is necessary in this matter and that the case should proceed on written submissions with oral

argument as appropriate. Alternatively, in the event a hearing is held, we urge that it be set to commence on or after February 25, 1987 and be held in Kansas City, Missouri.

Section 8(g)(3) of the Federal Deposit Insurance Act (12 U.S.C. § 1818(g)(3)) provides, in relevant part, that the appropriate Federal banking agency shall fix a

> ". . . place at which . . . the person may appear, personally or through counsel . . . to submit written materials (or, at the discretion of the agency, oral testimony) and oral argument."

It seems clear from a reading of the section that Congress expressed a preference for written materials and oral argument over oral testimony in fixing the ground rules for affording any respondent an opportunity to be heard under section 8(g). Congress apparently saw little or no need in section 8(g) cases for oral testimony other than in exceptional cases. Congress only included the oral testimony language as a parenthical expression and did not impose a *requirement* for a formal hearing under the Administrative Procedure Act (5 U.S.C. §551, *et seq*) or even oral testimony. All that Congress required is that respondents be afforded an opportunity to be heard. That Congressional mandate is satisfied by the FDIC proceeding in this case on the basis of written materials and oral argument. Here there is no compelling or even persuasive reason for requiring oral testimony. Without limiting in any way FDIC's prerogatives to refute Mr. Mallen's assertions, there is already an established record of Mr. Mallen's personal dishonesty which clearly demonstrates the actual and potential threat he poses to the interests of the depositors of Farmers State Bank ("Bank"). At the formal administrative hearing* under

* Prior to the conclusion of the hearing, the administrative law judge recused himself so that no decision in that case was ever forthcoming.

section 8(e) (12 U.S.C. § 1818(e)), which was held during September and October 1986 involving Mr. Mallen's activities at the Bank, over 1400 pages of sworn testimony and over 170 exhibits formed the record in that case. Even assuming that some witnesses at the hearing raised questions of credibility, there is more than enough credible testimony under oath of the FDIC's examiners and documentary evidence to establish Respondent's unsafe or unsound banking practices, personal dishonesty, breaches of his fiduciary duty as a director and officer, and his lack of trust, all of which demonstrate that Mr. Mallen's continued service and participation in the affairs of the Bank may pose a threat to the depositors' interests. Accordingly, we urge that the opportunity to be heard in this case be limited to written submissions consisting of the record developed against Mr. Mallen in the section 8(e) proceeding and any additional written submissions by the parties, together with oral arguments as appropriate.

Assuming that oral testimony is ordered, we urge that a hearing be set on or after February 25, 1987. The executive secretary is empowered to set a hearing date within 30 days of the date of receipt of the hearing request (12 C.F.R. § 308.61). Clearly, the 30-day timeframe is to allow for the proper and orderly arrangement of the details associated with any such hearing and to assure that essential witnesses will be available. Respondent's request for a hearing commencement date of February 9, 1987 would not allow sufficient time for such arrangements; and witness availability. It is, therefore, unreasonable and should be denied.

First, it is unrealistic for Mr. Mallen to expect that a qualified hearing official could be selected and available by February 9. Second, none of FDIC's essential witnesses, all of whom will probably be examiner personnel, will be available the week of February 9. All have

prior commitments which were set in advance of Mr. Mallen's request for a hearing. Third, Mr. Mallen offers no compelling factual basis nor any legal basis for the commencement of the hearing on such short notice. We are informed that the Notice was actually delivered to Respondent on January 26, 1987. Yet Respondent's request for an expedited hearing was dated January 30, 1987. No explanation is offered by Respondent as to why it took four days to draft what amounts to a one page request. Respondent's own delay belies the need for expedited treatment. Finally, Respondent offers not a scintilla of legal authority in support of the request for an expedited commencement date for the hearing.

Finally, the FDIC requests that the hearing be located in Kansas City, Missouri. All of the FDIC's witnesses are employed in the FDIC's Kansas City Regional Office, and documents and records which would be used at any hearing are stored here. It would, therefore, be a hardship on the part of the FDIC in terms of monetary expense and the inefficient use of limited manpower resources if the hearing is held outside of Kansas City, Missouri. On the other hand, other than a bald request, Respondent proffers no reason why any hearing order should be held in Iowa.

Respectully submitted,

/s/ GERALD F. LAMBERTI
Gerald F. Lamberti
Regional Counsel

GFL/ms

FDIC
Federal Deposit Insurance
Corporation
Washington, D.C. 20429

Office of the
Executive Secretary

February 4, 1987

James P. McCarthy, Esq.
Lindquist & Vennum
4200 IDS Center
Minneapolis, Minnesota 55402-2205

Dear Mr. McCarthy:

Re: Notice of Suspension and Prohibition
FDIC 87-5g
In the Matter of James E. Mallen

Reference is made to your letter of January 30, 1987, requesting a hearing under § 8(g) of the Federal Deposit Insurance Act (12 U.S.C. 1818(g)) in connection with the above-referenced matter and to my February 4, 1987 telephone conversation with Ms. Susan Barnes of your office relating to the selection of the presiding officer for that hearing.

As I discussed, § 8(g) provides that the hearing is to be "before one or more members of the agency or designated employees of the agency." The FDIC's Executive Secretary is authorized to select the presiding officer under implementing regulations (12 CFR Part 308, Subpart G) and he is prepared to select one or more persons who are presently regular, salaried employees of the FDIC to preside at this hearing.

However, as I stated, this Office is contracting with Mr. Richard White, former administrative law judge with the Interstate Commerce Commission, to provide services as

presiding officer in connection with informal hearings held under the Federal Deposit Insurance Act. For purposes of civil service rules and regulations, this person is not an employee of the FDIC but in our view can be considered an employee for the purposes of § 8(g) by virtue of his contractual relationship with the FDIC. We have contacted this person and he is available to serve as the presiding officer for the hearing.

If the selection of Mr. White as the presiding officer for the hearing to be conducted in the above-referenced matter is agreeable to you, please sign the enclosed copy of this letter or otherwise so advise us in writing. Because of the necessity to hold the hearing within 30 days of FDIC's receipt of your request, we must have a response within 3 business days of your receipt of this letter.

Please call me at (202) 898-3812 if you have any questions regarding this letter.

Sincerely,

/s/ MARGARET M. OLSEN
Margaret M. Olsen
Deputy Executive Secretary

Enclosure

I concur in the selection of Mr. White, retired administrative law judge, as presiding officer for the hearing to be held pursuant to § 8(g) of the Federal Deposit Insurance Act in connection with the Notice of Suspension and Prohibition, FDIC-87-5g.

Mary E. Curtin
James P. McCarthy

LINDQUIST & VENNUM
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MINNEAPOLIS, MINNESOTA 55402-2205
TELEPHONE (612) 371-3211

February 5, 1987

BY TELECOPY AND FEDERAL EXPRESS

Mr. Hoyle L. Robinson
Executive Secretary
Federal Deposit Insurance Corporation
550 - 17th Street N.W.
Washington, D.C. 20429

Attention: Margaret M. Olson

BY FEDERAL EXPRESS

Legal Division, Compliance and
Enforcement Section
Federal Deposit Insurance Corporation
550 - 17th Street N.W.
Washington, D.C. 20429

BY FEDERAL EXPRESS

Regional Counsel
Bank Supervision
Kansas City Regional Office
2345 Grand Avenue
Suite 1500
Kansas City, Missouri 64108

Re: In the Matter of James E. Mallen
Farmers State Bank, Kanawha, Iowa
FDIC-87-5g

Dear Mr. Robinson, Ms. Olson and Counsel:

As I indicated to you on the phone today, Mr. Mallen and Farmers State Bank, Kanawha, consent to Richard White, retired administrative law judge, serving as the officer of the hearing demanded by Mr. Mallen and Farmers State Bank. The consent does not alter the demand of Mr. Mallen and Farmers State Bank, Kanawha for immediate hearing and decision. The hearing and decision must be timely in light of the deprivation of liberty and property suffered by Mr. Mallen and Farmers State Bank without any hearing to date.

Mr. Mallen and Farmers State Bank, Kanawha are prepared to proceed to hearing immediately. In no event should the hearing commence any later than Monday, February 9, 1986. Mr. Mallen and Farmers State Bank demand a full administrative hearing with oral testimony, documentary evidence and written submissions to the administrative law judge.

As to location, Mr. Mallen and Farmers State Bank, Kanawha, request that the hearing be held in Minneapolis rather than in Iowa as originally requested and discussed. Having the hearing in Minneapolis rather than in Des Moines will be more convenient for Mr. Mallen's counsel, the administrative law judge and FDIC counsel. Airline connections, hotel accommodations and courtroom availability make Minneapolis/St. Paul a convenient and reasonable location. As I indicated on the telephone, Minneapolis/St. Paul has two federal courthouses, several federal buildings and two county courthouses. We will be happy to assist you in locating a hearing room or will undertake the task ourselves.

We object to the FDIC regional counsel's demand that the hearing be held in Kansas City. The regional counsel's demand flies in the face of the due process requirement em-

bodied in FDIC practice of holding hearings in the judicial district where the Bank is located or such other place as the Bank and its officers consent to. Mr. Mallen and Farmers State Bank, Kanawha do not consent to the hearing being held in Kansas City. They do consent to and request that it be held in Minneapolis, Minnesota.

So that there is no misunderstanding on the issue, it is the position of Mr. Mallen and Farmers State Bank, Kanawha that the issues of the timing of the hearing and the location of the hearing are not issues of convenience for the various parties. As the Executive Secretary is aware, this matter involves Section 8(g) suspension wherein Mr. Mallen has been deprived of liberty and property rights by the United States government without any hearing, judicial or administrative. Since he has already been deprived of his liberty and property rights without a hearing, the issues of timing of the hearing and place are not mere matters of scheduling convenience; they go to the heart of Mr. Mallen's rights under the U.S. Constitution. "Splitting the difference" with regional counsel's schedule does not satisfy Mr. Mallen's constitutional rights to an immediate post-deprivation hearing.

Sincerely,

/s/ JAMES P. MCCARTHY
James P. McCarthy

JPMc:lmn
enclosure

In the Supreme Court of the United States

No. 87-82

FEDERAL DEPOSIT INSURANCE CORPORATION,
APPELLANT

v.

JAMES E. MALLEN, ET AL.

APPEAL from the United States District Court for the Northern District Iowa.

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted.

October 19, 1987

U.S. GOVERNMENT PRINTING OFFICE: 1987 — 202-03/40012

APPELLANT'S

BRIEF

(5)

No. 87-82

FILED
DEC 17 1987
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CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1987

FEDERAL DEPOSIT INSURANCE CORPORATION, APPELLANT

v.

JAMES E. MALLEN, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF IOWA

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QUESTIONS PRESENTED

Under 12 U.S.C. 1818(g), whenever any director or officer of a federally-insured bank has been indicted for a crime involving dishonesty or breach of trust that is punishable by imprisonment for more than one year, the appropriate federal banking agency may suspend such person from office, pending resolution of the criminal charges, if his continued service may pose a threat to the interests of the bank's depositors or to public confidence in the bank. The questions are:

1. Whether Section 1818(g) is invalid under the Due Process Clause of the Fifth Amendment because it allows the agency a maximum of 30 days after receipt of a request to conduct a post-suspension hearing on the suspension and a maximum of 60 days after the hearing to issue a written decision whether the suspension order will be continued, terminated or modified.

2. Whether Section 1818(g) is invalid under the Due Process Clause because it gives the agency discretion as to whether to receive oral testimony at such a hearing.

II

PARTIES TO THE PROCEEDING

In addition to the parties to the proceeding named in the caption, Farmers State Bank of Kanawha, Iowa, was a plaintiff in the district court and an appellee when this appeal was docketed; it has since been placed in receivership, with the FDIC as receiver.

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In the Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-82

FEDERAL DEPOSIT INSURANCE CORPORATION, APPELLANT

v.

JAMES E. MALLEN, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF IOWA

BRIEF FOR THE APPELLANT

OPINIONS BELOW

The opinions of the district court holding 12 U.S.C. 1818(g) unconstitutional (J.S. App. 1a-18a), denying appellant's motion to alter or amend the judgment (J.S. App. 19a-23a), and denying its motion for a stay pending appeal (J.S. App. 24a-26a), are reported at 667 F. Supp. 652, 662, and 664, respectively.

JURISDICTION

The order of the district court holding Section 1818(g) unconstitutional was entered on February 17, 1987. The appellant filed its notice of appeal to this Court on March 11, 1987 (J.S. App. 33a-34a). By orders dated May 4 and May 30, 1987, Justice Blackmun extended the time within which to docket the appeal to June 9 and then to July 9, 1987. The FDIC filed its jurisdictional statement on the latter date. This Court noted probable jurisdiction on October 19, 1987. This Court's jurisdiction rests on 28 U.S.C. 1252.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment provides in pertinent part:

> nor shall any person • • • be deprived of life, liberty, or property, without due process of law • • •.

Section 1818(g) (12 U.S.C.) provides in pertinent part:

> Suspension or removal of director or officer charged with felony
>
> (1) Whenever any director or officer of an insured bank, or other person participating in the conduct of the affairs of such bank, is charged in any information, indictment, or complaint authorized by a United States attorney, with the commission of or participation in a crime involving dishonesty or breach of trust which is punishable by imprisonment for a term exceeding one year under State or Federal law, the appropriate Federal banking agency may, if continued service or participation by the individual may pose a threat to the interests of the bank's depositors or may threaten to impair public confidence in the bank, by written notice served upon such director, officer, or other person, suspend him from office or prohibit him from further participation in any manner in the conduct of the affairs of the bank. A copy of such notice shall also be served upon the bank. Such suspension or prohibition shall remain in effect until such information, indictment, or complaint is finally disposed of or until terminated by the agency. In the event that a judgment of conviction with respect to such crime is entered against such director, officer, or other person, and at such time as such judgment is not subject to further appellate review, the agency may, if continued service or participation by the individual may pose a threat to the interests of the bank's depositors or may threaten to impair public confidence in the bank, issue and serve upon such director, officer, or other person an order removing him from office or prohibiting him from further participation in any manner in the conduct of the affairs of the bank except with the consent of the appropriate agency. A copy of such order shall also be served upon such bank, whereupon such director or officer shall cease to be a director or officer of such bank. A finding of not guilty or other disposition of the charge shall not preclude the agency from thereafter instituting proceedings to remove such director, officer, or other person from office or to prohibit further participation in bank affairs, pursuant to paragraph (1), (2), (3), or (4) of subsection (e) of this section. Any notice of suspension or order of removal issued under this paragraph shall remain effective and outstanding until the completion of any hearing or appeal authorized under paragraph (3) hereof unless terminated by the agency.

• • • • •

> (3) Within thirty days from service of any notice of suspension or order of removal issued pursuant to paragraph (1) of this subsection, the director, officer, or other person concerned may request in writing an opportunity to appear before the agency to show that the continued service to or participation in the conduct of the affairs of the bank by such individual does not, or is not likely to, pose a threat to the interests of the bank's depositors or threaten to impair public confidence in the bank. Upon receipt of any such request, the appropriate Federal banking agency shall fix a time (not more than thirty days after receipt of such request, unless extended at the request of the concerned director, officer, or other person) and place at which the director, officer, or other person may appear, personally or through counsel, before one or more members of the agency or designated em-

ployees of the agency to submit written materials (or, at the discretion of the agency, oral testimony) and oral argument. Within sixty days of such hearing, the agency shall notify the director, officer, or other person whether the suspension or prohibition from participation in any manner in the affairs of the bank will be continued, terminated, or otherwise modified, or whether the order removing said director, officer or other person from office or prohibiting such individual from further participation in any manner in the conduct of the affairs of the bank will be rescinded or otherwise modified. Such notification shall contain a statement of the basis for the agency's decision, if adverse to the director, officer or other person. The Federal banking agencies are authorized to prescribe such rules as may be necessary to effectuate the purposes of this subsection.

A related statutory provision, 12 U.S.C. 1829, provides:

Conditions governing employment of personnel

Except with the written consent of the [Federal Deposit Insurance] Corporation, no person shall serve as a director, officer, or employee of an insured bank who has been convicted, or who is hereafter convicted, of any criminal offense involving dishonesty or a breach of trust. For each willful violation of this prohibition, the bank involved shall be subject to a penalty of not more than $100 for each day this prohibition is violated, which the Corporation may recover for its use.

STATEMENT

A. Mallen's Indictment And Suspension

Appellee Mallen was, at the time of the events giving rise to this appeal, the president and a director of Farmers State Bank of Kanawha, Iowa (J.S. App. 2a). He was also

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the largest stockholder of Kanawha Investment Holding Company, a bank holding company that owned 92% of the stock of the bank (*id.* at 8a). On December 10, 1986, a federal grand jury in the Northern District of Iowa returned a two-count indictment against Mallen. Count 1 charged him with violating 18 U.S.C. 1014 by making false statements in a personal financial statement for the purpose of influencing the actions of appellant Federal Deposit Insurance Corporation (the FDIC). Violation of Section 1014 carries a penalty of up to two years in prison. Count 2 charged Mallen with violating 18 U.S.C. 1001 by making false statements to the FDIC, a charge that carries a penalty of up to five years in prison.

When an officer or director of a federally-insured bank is indicted for a crime involving dishonesty or breach of trust that carries a penalty of imprisonment for more than one year, Section 1818(g)(1) authorizes the appropriate federal banking agency—in the case of Farmers State Bank, the FDIC—by written notice to suspend the officer or director from office or to prohibit him from further participation in the conduct of the bank's affairs, if his continued service "may pose a threat to the interests of the bank's depositors or may threaten to impair public confidence in the bank." The suspension or prohibition is effective upon service of the notice.

Under Section 1818(g)(3), the suspended officer may, within 30 days after receipt of the notice, request "an opportunity to appear before the agency to show that the continued service to or participation in the conduct of the affairs of the bank by such individual does not, or is not likely to, pose a threat to the interests of the bank's depositors or threaten to impair public confidence in the bank." The agency is required to hold a hearing within 30 days after receipt of such a request. At the hearing, the suspended officer may "submit written materials (or, at the discretion of the agency, oral testimony) and oral argu-

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ment." *Ibid.* The FDIC has by rule delegated to the hearing officer the authority to decide whether to receive oral testimony (12 C.F.R. 308.61(e)), which if received is subject to cross examination.[1] Within 60 days after the hearing the agency is required to notify the suspended officer whether the suspension or prohibition will be continued, terminated or otherwise modified. If the decision is adverse to the officer, the agency is required to provide a statement of the basis for its decision.

The suspension or prohibition remains in effect until the indictment "is finally disposed of or until terminated by the agency" (12 U.S.C. 1818(g)(1)). Subsection (g)(1) goes on to provide that if that final disposition is a judgment of conviction not subject to further appellate review, the appropriate federal banking agency may then remove the officer from office or prohibit him from further participation in the conduct of the bank's affairs except with the agency's permission. The hearing procedures provided in Section 1818(g)(3) with respect to a suspension are also provided with respect to such a permanent removal.[2]

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[1] Hearings under Section 1818(g) are governed by 12 C.F.R. 308.55 *et seq.* Such hearings are adversarial in structure, involving the officer or director and the FDIC's Office of General Counsel's Compliance and Enforcement Section, usually acting through the concerned Regional Counsel. Administrative functions, including the provision of a hearing officer and scheduling the proceeding, are handled by the FDIC's Executive Secretary. The other federal banking agencies with suspension and removal authority under Section 1818(g) also have regulations setting out their procedures. See 12 C.F.R. 19.30-19.34 (Comptroller of the Currency); 12 C.F.R. 263.30-263.33 (Federal Reserve Board).

[2] An effective suspension or removal order under Section 1818(g) has collateral consequences under Section 1818(j), which prescribes criminal penalties for anyone subject to such an order who "(i) participates in any manner in the conduct of the affairs of the bank involved [including through the exercise of voting rights], * * * or (ii) without the prior written approval of the appropriate Federal banking agency, votes for a director, serves or acts as a director, officer, or employee of *any* bank" (emphasis added).

On January 26, 1987, on the basis of the indictment described above, the FDIC served on Mallen, with a copy to the bank, a Notice and Order of Suspension and Prohibition, effective upon service, suspending him from office and prohibiting him from further participation in the affairs of the bank during the pendency of the criminal proceedings (J.S. App. 27a-29a).[3] The Notice and Order advised Mallen of his procedural rights under Section 1818(g)(3) (J.S. App. 27a-28a). On January 30, 1987, Mallen requested an immediate administrative hearing, with opportunity to present written evidence and oral testimony (*id.* at 4a). After an exchange of views as to the timing of the hearing between Mallen's counsel and the FDIC's Regional Counsel, the FDIC's Executive Secretary scheduled a hearing for February 18, 1987, 19 days after the date shown on Mallen's request (*ibid.*). The FDIC's Regional Counsel initially "took the position that the hearings should simply be oral argument on written submissions" (*ibid.*),[4] but it never became "clear whether oral evidence would be permitted, since denying permission to present oral evidence is in the discretion of the hearing officer" (*ibid.*), who was never given an opportunity to rule.

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[3] The suspension prevented Mallen from acting as an officer or director of the bank. The prohibition more broadly prevented him from any participation in the bank's affairs. Its most important practical effect was to bar him from voting his shares in the holding company.

[4] FDIC Regional Counsels normally do not oppose oral testimony (see generally Hearing Tr. 60-61). The Regional Counsel's suggestion that oral evidence be dispensed with in the present case, set forth in a letter dated February 2, 1987, to the Executive Secretary of the FDIC and to Mallen's counsel (J.A. 28-30), was based in part on the fact that the record of a recent similar adversarial proceeding, which produced 1400 pages of sworn testimony, was available. Under a separate subsection, 12 U.S.C. 1818(e)(1), the appropriate federal banking

B. Proceedings In The District Court

On February 6, 1987, before the hearing could take place, Mallen filed this action in the United States District Court for the Northern District of Iowa, asking that Section 1818(g) be declared unconstitutional and that the FDIC be enjoined from enforcing the Notice and Order against him (J.S. App. 1a-2a). Mallen argued that the suspension and prohibition deprived him of liberty and property within the meaning of the Fifth Amendment. He claimed that the post-suspension hearing provided for in the statute was inadequate because (1) the delay permitted between his request for a hearing and a final decision by the FDIC was excessive and (2) the hearing officer was authorized, in his discretion, not to allow oral testimony. Mallen also argued that the statute was unconstitutional because it does not provide for judicial review of the FDIC's ultimate decision to continue, modify or terminate the suspension.[5] Mallen sought a temporary restraining

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agency may, after a hearing, suspend or remove a bank official for various kinds of misconduct. A Section 1818(e)(1) proceeding had been brought against Mallen in the fall of 1986, with hearings held in September and October 1986. Although a substantial evidentiary record was developed in that proceeding, no result was reached because the administrative law judge recused himself before ruling. See J.S. App. 3a n.1.

[5] The court did not reach this question. Section 1818(i) states that "except as otherwise provided in this section no court shall have jurisdiction to affect by injunction or otherwise the issuance or enforcement of any notice or order under this section, or to review, modify, suspend, terminate, or set aside any such notice or order." The FDIC took the position that this provision does preclude judicial review of the agency's decision to suspend an indicted officer or director and that it is constitutional to do so.

Mallen's complaint also alleged that Section 1818(g) violates the Due Process Clause of the Fifth Amendment "because it discriminates against those indicted for federal offenses, but not similar state law offenses" (J.A. 7). The district court never ruled on this count. The

order, a preliminary injunction and a permanent injunction. *Id.* at 6a. The FDIC responded that the statute afforded Mallen due process.[6]

On February 17, 1987, the district court enjoined the FDIC from enforcing the notice of suspension and prohibition.[7] The district court determined (J.S. App. 17a) that it had jurisdiction to decide the constitutional issue under 28 U.S.C. 1331. The court then concluded that both Mallen and the bank had property interests in Mallen's continued employment and participation in the bank's affairs (J.S. App. 9a). Citing this Court's formulation in *Mathews* v. *Eldridge*, 424 U.S. 319, 333 (1976), that due process requires "[an] opportunity to be heard at a meaningful time and in a meaningful manner," the district court next inquired whether it was permissible to suspend Mallen with no pre-suspension hearing (J.S. App. 9a). The

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statute refers to violations of "State or Federal law" (12 U.S.C. 1818(g)(1)).

[6] The FDIC also contended that the district court lacked jurisdiction over the case because of Section 1818(i)(1) (see note 5, *supra*). The district court understood, however, that it was "not contended that the Court has no jurisdiction to review the constitutionality of the statutory scheme," and found that it had jurisdiction under 28 U.S.C. 1331 (J.S. App. 17a). We do not argue that Section 1818(i) deprives federal courts of jurisdiction to consider the constitutionality of Section 1818(g). Cf. *Johnson* v. *Robison*, 415 U.S. 361, 366-367 (1974).

[7] The district court did not make clear whether its injunction was preliminary or permanent. On the one hand, it explained (J.S. App. 1a) that it was ruling on the motion for a preliminary injunction, recited the standard for granting preliminary relief (*id.* at 7a-8a) and later described its ruling as "based only on the record that had been made to the date of the preliminary injunction hearing" (*id.* at 19a n.1). On the other hand, the bulk of the court's discussion was on the merits of the claim, no further hearing was set and the Order was permanent in form (*id.* at 18a). Especially in light of the district court's subsequent refusal to modify its order, we understand it to have issued a permanent injunction.

court decided, citing *Mackey* v. *Montrym*, 443 U.S. 1 (1979), that the Constitution does not mandate a pre-suspension hearing because "in cases such as this there generally is a compelling [governmental] interest in a summary adjudication" (J.S. App. 10a).

The court ruled, however, that the time periods set forth in Section 1818(g)(3) deprived Mallen of a meaningful hearing.[8] The court found the situation analogous to that in *Barry* v. *Barchi*, 443 U.S. 55 (1979), in which this Court partially invalidated the New York State Racing Commission's procedures for summary suspension of horse trainers whose horses tested positive for drugs. In *Barry*, the Court noted that while Barchi had been suspended for 15 days, there was no time limit for the convening of a hearing, and the Racing Commission's procedures gave the Commission up to thirty days after the conclusion of a hearing in which to rule finally on the suspension (*id.* at 59-61). Thus, under the New York system trainers like Barchi could be subjected to brief suspensions with no timely opportunity to "put the State to its proof" (*id.* at 66).

Noting (J.S. App. 5a) that, under the Speedy Trial Act, 18 U.S.C. 3161(c)(1), which requires that a criminal trial begin within 70 days (not including any "excludable time") after the filing of an indictment, Mallen's criminal trial could be over (assuming minimal "excludable time") before the expiration of the 90-day period permitted by

[8] The section allows a maximum of 90 days to elapse between a request for a hearing and a final determination (assuming the hearing takes one day). The district court evidently believed that the FDIC's regulations allow a total of 95 days (J.S. App. 4a), but that is not correct. The applicable regulation, 12 C.F.R. 308.61(g), allows five days after the hearing for the record to be supplemented, but the regulation makes it clear that this does not toll the 60 day time period for a final agency decision after the hearing. 12 U.S.C. 1818(g)(3); 12 C.F.R. 308.62.

Section 1818(g), the district court concluded that the statute's post-suspension hearing was a "toothless" remedy, because it would give Mallen meaningful process only if the FDIC wanted it to (J.S. App. 11a-12a). The district court was unable to find any persuasive reason why the FDIC should need 90 days to make a decision (*id.* at 16a).

The district court also found the statute unconstitutional because it gives the FDIC discretion to receive or not receive oral testimony. The court stated that "at some point, the plaintiff in a case such as this should have an opportunity to present live witnesses" (J.S. App. 15a) and that the FDIC had given no persuasive reason why "denial of the opportunity to present [oral] evidence is in the sole discretion of a hearing officer" (*id.* at 16a). Rather than order the FDIC to adhere to a stricter timetable and to allow oral testimony at the hearing, the court concluded that the post-suspension procedures "violate due process" and enjoined the FDIC from enforcing the Notice and Order of Suspension and Prohibition against Mallen (*id.* at 18a).

On February 27, 1987, the FDIC moved the district court to amend its order. The FDIC proposed that, rather than being enjoined entirely from enforcing the suspension order, it be required to provide Mallen with a prompt hearing, to hear oral testimony, and to make its decision promptly thereafter (J.S. App. 20a). At a March 6 hearing before the district court, the FDIC suggested that it hold a hearing on March 9, with an oral disposition by March 26 and written disposition by April 8 (*ibid.*).

On March 10, 1987, the district court entered an order refusing to amend its earlier order. It noted that Mallen's criminal trial was scheduled to begin on March 16 and was estimated to last one week. Thus, as the district court understood the situation, the FDIC's decision on the suspension would be entered "only after Mallen has 'suf-

fered the full penalty imposed' by the suspension." J.S. App. 20a (quoting *Barry* v. *Barchi,* 443 U.S. at 66). The district court also thought it unfair to Mallen to permit the FDIC to conduct a hearing on the suspension at a time so close to Mallen's criminal trial (J.S. App. 21a-22a). The next day, the district court denied the FDIC's motion for a stay pending appeal (*id.* at 24a-26a).[9] The FDIC then noticed its appeal to this Court (*id.* at 33a-34a).

C. Subsequent Events

Mallen's criminal trial began on March 16 (before a different judge). On March 24, the jury convicted him on both counts of the indictment. On May 1, the court in the criminal case sentenced Mallen on the second count to three years' imprisonment, suspended all but sixty days, and fined him $10,000. The court set aside the first count, finding the indictment defective. Mallen's appeal, and the Government's cross appeal of the dismissal of the first count of the indictment, are pending in the United States Court of Appeals for the Eighth Circuit (Nos. 87-1590 and 87-1722); oral argument was heard on December 14, 1987. Mallen has served his prison sentence and is currently on probation.

Mallen's conviction brought him within a separate section, 12 U.S.C. 1829, which bars any person who has been convicted of a crime involving dishonesty or breach of trust from serving as an officer, director or employee of any insured bank, except with FDIC consent.[10] After the

[9] The district court did stay its order "[t]o the extent that this Court's rulings have an impact on other cases involving indicted bank officers" (J.S. App. 25a). Mallen and the bank were the only plaintiffs in the district court proceeding.

[10] Unlike Section 1818(g), Section 1829 does not prohibit participation in the affairs of a bank otherwise than as a director, officer, or employee. Also unlike Section 1818(g), it does not require a triggering agency order, nor a determination that the officer's continued service may threaten depositors' interests or public confidence in the bank.

conviction, the FDIC informed Mallen that it would not consent to his service at Farmers State Bank. On May 29, 1987, pursuant to Section 1829, at the FDIC's request, the presiding judge in the criminal case preliminarily enjoined Mallen from serving as an officer, director, or employee of the bank. *FDIC* v. *Mallen,* 661 F. Supp. 1003 (N.D. Iowa 1987). Mallen has not appealed that order.

On July 30, 1987, after the jurisdictional statement was filed in this case, the Iowa Superintendant of Banking closed Farmers State Bank and placed it in receivership. The FDIC was appointed receiver and immediately executed a "purchase and assumption" transaction under which the deposit liabilities of Farmers State Bank were assumed by First National Bank of Clarion, Iowa.[11] Farmers State Bank's former offices are now a branch of First National Bank of Clarion.[12] The former bank is no longer authorized to conduct operations but it has not yet been finally dissolved by the Iowa authorities and retains its corporate existence, subject to a receivership, until its affairs are finally wound up. We understand that Mallen is

[11] The receivership and the purchase and assumption transaction were challenged in an action against the Iowa Superintendent of Banking in the Iowa courts. The lower court upheld the Superintendent and the case is currently pending before the Supreme Court of Iowa (No. 87-1199).

[12] Although Mallen's suspension appears to have limited practical significance in light of the closing of the bank, this case is not technically moot. Under Section 1818(g)(1), the Notice and Order of Suspension and Prohibition would, but for the district court's injunction, have remained in effect until Mallen's indictment "is finally disposed of or until terminated by the agency." As discussed (note 2, *supra*), the Notice and Order collaterally prevents Mallen from serving as a officer or director of *any* bank (12 U.S.C. 1818(j)). When Mallen's indictment is "finally disposed of," the relief currently sought by the FDIC—reinstatement of the enjoined suspension—would no longer be available, and this controversy may be moot.

still President of the remaining shell corporation and still a stockholder in the holding company that owns most of the shell's stock.

SUMMARY OF ARGUMENT

The district court stated correctly (J.S. App. 8a) that a bank officer generally has a property interest in his position at the bank. It then recognized (*id.* at 9a-10a) that the dictates of due process, in connection with a temporary deprivation of such a position, are not rigid and universal but depend, under *Mathews* v. *Eldridge,* 424 U.S. 319 (1976), upon a careful analysis of what is at stake. Then, however, the district court all but ignored the fact that the premise for a Section 1818(g) suspension is an indictment for one or more felonies involving dishonesty or breach of trust. As a result, the district court did not soundly analyze either what is substantively at stake in a Section 1818(g)(3) hearing or what process is due.

A suspension under Section 1818(g) rests on (a) the existence of a serious unresolved criminal charge plus (b) the agency's determination that the bank officer's continued service in that circumstance "may pose a threat to the interests of the bank's depositors or may threaten to impair public confidence in the bank" (12 U.S.C. 1818(g)(1)). It is plainly not the function of a Section 1818(g)(3) hearing to test the validity of the criminal charge: the grand jury's indictment, which neutrally establishes that there is probable cause to believe that the officer has committed a felony, is a constitutionally sufficient procedure to subject him to arrest, detention and trial (see *Gerstein* v. *Pugh,* 420 U.S. 103, 117 n.19 (1975)), and it is surely sufficient from a procedural standpoint to subject him to suspension from a position at a federally insured bank as well; after the indictment (and suspension), adjudication of the criminal charge is the function of the criminal process (which of course has its own provisions for speed and other

safeguards); the Section 1818(g)(3) hearing proceeds on the assumption that there is a valid, but as yet unadjudicated, criminal indictment.

The stated function of a Section 1818(g)(3) hearing is to give the indicted bank officer "an opportunity to appear before the agency to show that [his] continued service * * * does not, or is not likely to, pose a threat to the interests of the bank's depositors or threaten to impair public confidence in the bank" (12 U.S.C. 1818(g)(3)). There is every reason to assume that Congress wanted such a purported showing by an indicted officer to be accepted only with caution and that that is why it afforded the agency up to 90 days, a modest period in any event, to give the matter careful consideration before readmitting the indicted officer to the bank. As originally adopted Section 1818(g) provided for suspension following an indictment without any hearing at all. But while Congress expected that such suspensions would be "virtually routine" (S. Rep. 1482, 89th Cong., 2d Sess. 2 (1966)), it did not make suspension automatic but provided only that the agency "may" suspend. In *Feinberg* v. *FDIC,* 420 F. Supp. 109 (D.D.C. 1976), a three-judge court ruled that, since the agency did have discretion not to suspend, the officer had a constitutional right to be heard on the issue. The present statute, including its time limits, was enacted in direct response to *Feinberg*. There is no reason to believe that Congress intended to create a broad substantive exception to the presumption that an indicted bank officer will be suspended pending adjudication of the charge, or to conclude that the Constitution requires the agency to act on this important matter—returning an indicted officer to his bank—in less time than Congress thought appropriate.

The 90 days that Congress allowed for a hearing and agency deliberation are in any event plainly not excessive in light of the three *Mathews* factors. The indicted officer's interest in his *position* is of course substantial,

but that is not a fair measure of what he has at stake at the Section 1818(g)(3) hearing: his legal right to occupy that position has already been sharply impaired by the grand jury's decision to indict, which must be taken as given; what he has at stake at the hearing is only the chance of persuading the agency that, despite the indictment, he poses no threat to depositors or public confidence. On the other hand, the public's interest in not returning an officer, indicted for a felony involving dishonesty or breach of trust, to a federally insured bank without careful consideration is obviously substantial. Finally, "the risk of an erroneous deprivation" (424 U.S. at 335) is quite low, again because the grand jury's evaluation of the accusations against the individual must for this purpose be taken as given; it is only the agency's assessment of the risks to the interests of depositors and to public confidence that may be challenged as erroneous.

The district court, relying on a faulty analogy to *Barry* v. *Barchi, supra,* found that the hearing provided by Section 1818(g)(3) was insufficiently prompt to be meaningful. In *Barry*, this Court ruled that horse trainers subjected to short disciplinary suspensions were not given a "meaningful opportunity to be heard" by a hearing process that would routinely result in a decision only after a suspension had run its course (see 443 U.S. at 66). Here, the district court thought that since the Speedy Trial Act requires that a criminal trial begin within 70 days, the 90 days allowed by Section 1818(g)(3) posed the same problems. But, first, the premise that the suspension will normally be shorter than 90 days is quite wrong: many criminal trials take considerably longer than 90 days from indictment to conviction and in any event a Section 1818(g) suspension continues, not until the end of the trial, but until any appeals are exhausted. More importantly, the district court wholly misunderstood the point of *Barry*. The Court's concern in that case was that suspensions constituting penalties for assumed misconduct might be imposed without any opportunity to challenge the assumption of misconduct, because the hearing would routinely come too late. Here, the bank officer's suspension rests on a criminal charge plus the agency's conclusion that his continued service might pose a risk to depositors or public confidence; he has opportunities to be heard in response to both the criminal charge and the agency's conclusion. The fact that the former opportunity may in some instances come more swiftly does not mean that the latter is constitutionally inadequate.

The district court's conclusion that Section 1818(g) is unconstitutional because it does not give the suspended officer the right to present oral testimony is manifestly erroneous. The FDIC Regional Counsels normally do not object to a request to present oral testimony, and there had been no determination not to allow such testimony here. However, due process does not require that every indicted bank officer have the opportunity to present live testimony, in addition to written materials and oral argument, at a Section 1818(g)(3) hearing: the question whether the officer's continued service may pose a risk to depositors or public confidence will (especially since the criminal charge must be taken as given) generally turn on record facts and the agency's expert judgment, and not on the credibility of the officer or his witnesses. The possibility that there might be a case where due process requires an opportunity to present live testimony does not invalidate Section 1818(g).

ARGUMENT

THE SUSPENSION PROCEDURES SET FORTH IN 12 U.S.C. 1818(g)(3) COMPORT WITH DUE PROCESS

A. The 90-Day Period Provided By Section 1818(g) For A Banking Agency To Determine Whether To Continue, Terminate, Or Otherwise Modify A Suspension Under That Section Comports With Due Process

The district court correctly recognized (J.S. App. 9a-10a) that the dictates of due process are not rigid and universal but depend, under *Mathews* v. *Eldridge, supra,* on the interests of the individual, the interests of the government, and the risk of error in the particular circumstances. Then, however, the district court all but ignored the fact that the premise for a suspension under Section 1818(g) is a determination (generally, as here, by a grand jury) that there is probable cause to believe that the bank officer has committed a felony involving dishonesty or breach of trust. As a result, the district court failed to appreciate the function of the Section 1818(g)(3) hearing whose timetable it was trying to evaluate.

Section 1818(g) was originally enacted as part of the Financial Institutions Supervisory Act of 1966, Pub. L. No. 89-695, § 202, 80 Stat. 1050.[13] As adopted in 1966, the section simply provided that an official of a federally insured bank "may" be suspended by the appropriate federal banking agency. Although the statute thus gave the agency discretion not to suspend, Congress expressly expected that suspension following indictment would be "virtually routine" (S. Rep. 1482, *supra*, at 2). There was no statutory predicate for a suspension other than the

[13] Section 1818(g) is only one of several provisions reflecting the importance of swift summary action by bank regulatory agencies to protect insured banks from conditions that threaten their depositors or public confidence. See, *e.g.*, 12 U.S.C. 1818(c) (temporary orders to cease and desist from unsafe or unsound practices).

criminal charge, and there was no provision for a Section 1818(g) hearing of any kind: suspension would simply continue until the outcome of the criminal proceedings.

The section as originally enacted was challenged in *Feinberg* v. *FDIC,* 420 F. Supp. 109 (D.D.C. 1976) (three-judge court). Feinberg had been indicted for conspiracy to commit mail fraud, and the FDIC had suspended him from his position as President and a director of the Jefferson State Bank of Chicago and had prohibited him from participating in the bank's affairs. Feinberg brought suit, claiming that he had been deprived of liberty and property without due process, since he had been provided with nothing more than an informal conference with FDIC officials prior to his suspension (*id.* at 111).

The court in *Feinberg* recognized the dangers to banks and their depositors potentially arising from continued participation in their affairs by persons indicted for serious crimes, and it fully appreciated the need for summary suspensions. Based on its examination of the statute and its legislative history, the three-judge court said, "there is a strong governmental-public interest in speedily and efficiently removing indicted officers, directors or employees from financial institutions, the viability of which depend on the public's confidence" (420 F. Supp. at 119). The court found it "clear from the congressional history that Congress, in passing 12 U.S.C. §1818, was concerned with the dangerous effect of the public's loss of confidence in financial institutions" (*id.* at 120) and, after noting that Section 1818 originated with the banking agencies, added (420 F. Supp. at 120):

> In order to maintain the public's confidence, Congress agreed with the agencies that immediate action was necessary where a director, officer or employee of an insured bank was indicted for a felony involving dishonesty or breach of trust. To delay this action, which occurs in the form of a Notice and Order of Suspension, would thus seriously and directly under-

mine the congressional purpose behind section 1818(g)(1).

Accordingly, the three-judge court ruled that a pre-suspension hearing was not constitutionally required (*ibid.*).

The *Feinberg* court also observed that it "appears arguable that if the issuance of a Notice and Order of Suspension were automatic upon the return of an indictment or the filing of an information or complaint, then there might not be a need for a hearing" (420 F. Supp. at 116 (footnote omitted)). Noting, however, that the statute required the agency to decide whether the crime *is* one involving "dishonesty or a breach of trust" and that the word "may" (issue a notice of suspension) apparently contemplated some exercise of discretion, the court ruled that Section 1818(g) as originally enacted was unconstitutional for failure to provide any hearing at all. The court stated that at a minimum due process required an "immediate post-suspension hearing" (420 F. Supp. at 120). The court added that in its view "notice, the opportunity to be represented by counsel, for written submissions, and for oral argument, appear mandated by the circumstances" (*ibid.*), but that " 'the nature of the relevant inquiry' * * * does not seem to require any more than written submission [of evidence]." *Ibid.* (footnote omitted) (quoting *Mathews* v. *Eldridge*, 424 U.S. 319, 343 (1976)).

In direct response to *Feinberg*, Congress amended Section 1818(g) in two respects. First, it amended paragraph (1) to add the condition that "continued service or participation by the individual may pose a threat to the interests of the bank's depositors or may threaten to impair public confidence in the bank." Second, it added paragraph (3), providing for a post-suspension hearing at which the officer may appear before the agency to show that his continued service does not pose such a threat. Paragraph (3) generally affords the procedures outlined by the *Feinberg* court: the hearing must be convened within 30 days, with a written decision to follow within 60 days;

written submissions and oral argument are to be received, but the receipt of oral testimony is discretionary with the agency. Pub. L. No. 95-630, § 111(a)(1), 92 Stat. 3665-3666. The House Report accompanying this amendment explained that *Feinberg* had held that "the removal statute was deficient since it did not provide opportunity for hearing and review of an agency's action. Under the provisions of H.R. 13471 an individual will now have that opportunity" (H.R. Rep. 95-1383, 95th Cong., 2d Sess. 19 (1978)).

There is no indication in the legislative history that Congress, by adding the condition that there be possible threat to the bank's depositors or public confidence, intended any substantial modification of the prior expectation that suspensions following indictment would be "virtually routine." The "may pose a threat" threshold is a very low one, evidently intended to provide some standard, to be applied at the hearing mandated by the *Feinberg* court, for the exercise of the discretion contained in the word "may." But there is no indication that the 1978 Congress considered summary and "virtually routine" suspension any less vital to the protection of federally-insured banks. And the time periods, totalling up to 90 days, that Congress gave the agency to consider any decision to terminate a suspension and return an indicted officer to an insured bank were chosen by Congress as part of its express response to the *Feinberg* court's requirement of a hearing that would afford due process.

Congress's determination that the 30- and 60-day time periods struck the appropriate balance, between the need to protect depositors and the public from a too-hasty decision to terminate a suspension and the officer's right to be heard in connection with the agency's exercise of its discretion, is of course entitled to substantial deference. The deference the Court pays to "the duly enacted and carefully considered decision of a coequal and representative branch of our Government * * * must be afforded even though the claim is that a statute Congress has enacted

effects a denial of the procedural due process guaranteed by the Fifth Amendment." *Walters* v. *National Ass'n of Radiation Survivors,* 473 U.S. 305, 319-320 (1985), citing *Schweiker* v. *McClure,* 456 U.S. 188 (1982), *Mathews* v. *Eldridge,* 424 U.S. 319, 349 (1976). The principle of deference to Congress's judgment is especially strong since "there is no obvious bright line dictating when a [post-deprivation] hearing must occur." *United States* v. *Eight Thousand Eight Hundred and Fifty Dollars ($8,850) in United States Currency,* 461 U.S. 555, 562 (1983); see also *United States* v. *Von Neumann,* 474 U.S. 242, 248 (1986) (citation omitted) (lower court's attempt to set specific time limits for post-seizure remission proceedings " 'ill-advised' "). The district court's exercise of the federal courts' "ultimate and supreme [power]" (*Chicago & Grand Trunk Ry.* v. *Wellman,* 143 U.S. 339, 345 (1892)) to invalidate a deliberate congressional determination in an area known for "the impossibility of drawing firm lines" (*Cleveland Bd. of Educ.* v. *Loudermill,* 470 U.S. 532, 557 n.4 (1985) (Brennan, J., concurring in part and dissenting in part)), did not afford the appropriate deference to the weight Congress gave to the competing interests of the indicted officer and the public.

In any event, the time periods allowed by Section 1818(g)(3) are well within the requirements of due process under the circumstances. The basic principle is that when the government deprives an individual of property he must receive a hearing " 'at a meaningful time and in a meaningful manner.' " *Mathews* v. *Eldridge,* 424 U.S. at 333 (quoting *Armstrong* v. *Manzo,* 380 U.S. 545, 552 (1965)). In any particular case, "the timing and nature of the required hearing 'will depend on appropriate accommodation of the competing interests involved.' " *Logan* v. *Zimmerman Brush Co.,* 455 U.S. 422, 434 (1982) (footnote omitted) (quoting *Goss* v. *Lopez,* 419 U.S. 565, 579 (1975)). The factors to be weighed "include the importance of the private interest and the length or finality of the deprivation * * * the likelihood of governmental error

* * * and the magnitude of the governmental interests involved" (*Logan,* 455 U.S. at 434 (citations omitted)). In a case concerning the timing of a post-deprivation hearing, the inquiry into the govenmental interests includes consideration of the reasons a particular amount of time may be required, while the inquiry into the individual's interests includes the length of time between the initial deprivation and the hearing as well as the length of the deprivation itself (see *Eight Thousand Eight Hundred and Fifty Dollars,* 461 U.S. at 565-568).[14]

(i) The suspended officer does, of course, have a substantial interest in his *position,* but that is not a fair measure of what he has at stake for purposes of assessing the need to expedite a Section 1818(g)(3) determination. Congress has made his right to occupy that position subject to suspension if he has been indicted for a felony involving dishonesty or breach of trust.[15] The indictment represents a grand jury's determination that probable

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[14] Although *Eight Thousand Eight Hundred and Fifty Dollars* bears strongly on this case, we do not believe that its four-factor balancing test, derived from *Barker* v. *Wingo,* 407 U.S. 514 (1972), specifically governs the outcome here. *Eight Thousand Eight Hundred and Fifty Dollars* and *Barker* both involved delays in the government's decision to institute proceedings—civil forfeiture in the former case, a criminal trial in the latter; that is why their test includes the individual's ability to trigger the process on his own (see 461 U.S. at 568-569). This case, by contrast, involves, not open-ended delay while the government decides how to proceed, but statutory time periods controlling a hearing and decision.

[15] Federal crimes for which the penalty may exceed one year in prison may be prosecuted only by indictment, unless the defendant waives that right. Fed. R. Crim. P. 7(a) and (b). Section 1818(g) also permits suspension of officers and directors accused in a complaint authorized by a United States Attorney, or in an information, including an information charging a state crime. A suspension based on an accusation not amounting to a determination of probable cause might present statutory or constitutional questions not presented in this case.

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cause exists (*United States* v. *Calandra*, 414 U.S. 338, 343 (1974));[16] it is not the function of a Section 1818(g)(3) hearing to second-guess the indictment or anticipate the outcome of the criminal process. See 12 U.S.C. 1818(g)(3); 12 C.F.R. 308.56(a). What the suspended officer has at stake in a Section 1818(g)(3) hearing, for purposes of assessing the need for expedition, is the chance to persuade the agency that, notwithstanding the existence of probable cause to believe he has committed a felony involving dishonesty or breach of trust, his continued service does not pose a threat to depositors or public confidence.

The time allowed for the FDIC's final determination, considered as a burden on the indicted officer, is a good deal shorter than other periods that this Court has found permissible for significant decisions. In *Loudermill*, the Court rejected the suggestion that due process was denied when nine months elapsed between the post-termination hearing and a final decision: "A 9-month adjudication is not, of course, unconstitutionally lengthy *per se*" (470 U.S. at 547). In *Mathews*, the Court found acceptable a one-year delay in the final decision on disability benefits (424 U.S. at 341-342), while in *Eight Thousand Eight Hundred and Fifty Dollars* an 18-month delay before the first hearing after a currency seizure at the border was determined to be "quite significant" but not excessive (461 U.S. at 565).[17] Cf. *Brock* v. *Roadway Express, Inc.*,

[16] The decision to indict "is made by a deliberative public body acting as an arm of the judiciary, operating under constitutional and other legal constraints." *James A. Merritt & Sons* v. *Marsh*, 791 F.2d 328, 330 (4th Cir. 1986). Such a decision is constitutionally sufficient to subject the defendant to arrest, detention, and trial (see *Baker* v. *McCollan*, 443 U.S. 137, 142-143 (1979), citing *Gerstein* v. *Pugh*, 420 U.S. 103 (1975)), and it is surely procedurally sufficient to support suspension from a position at a federally-insured bank.

[17] The burden of delay is generally greater when the affected individual is uncertain *when* he will receive a decision (see *Loudermill*, 470 U.S. at 550 (Marshall, J., concurring in part and concurring in the judgment)). A suspended bank officer knows that the hearing must take place within 30 days and that a decision will be made at most 60 days after the hearing.

No. 85-1530 (Apr. 22, 1987), slip op. 14 (declining to rule on constitutionality of 19-month delay in final adjudication by Secretary of Transportation).

(ii) The public has a strong interest in giving the banking agencies the 90 days Congress afforded them to decide whether to allow an indicted officer to return to a position at a federally-insured bank. As the text of Section 1818(g) reminds us, banks and the banking system depend on public confidence and it is important not only that the decision be made correctly but also that it be perceived to have been made with due caution.

The three-judge court in *Feinberg* (420 F. Supp. at 119) and the district court (J.S. App. 10a) here recognized that the need to protect both depositors and public confidence in the banking system is urgent enough to make the indictment of a bank officer the kind of extraordinary event that justifies suspension without a prior hearing. As this Court recently noted, the deposit insurance system itself was enacted because, "[f]aced with virtual panic, Congress attempted to safeguard the hard earnings of individuals against the possibility that bank failures would deprive them of their savings." *FDIC* v. *Philadelphia Gear Corp.*, 476 U.S. 426, 432 (1986). Because of its extreme sensitivity, banking has been "one of the longest regulated and most closely supervised of public callings." *Fahey* v. *Mallonee*, 332 U.S. 245, 250 (1947).

The same urgency that justifies summary suspension without prior proceedings also justifies allowing the agencies enough time to proceed with appropriate caution before a suspension is terminated. Misconduct by officers and directors represents a particularly severe threat to depositors and banking. The Chairman of the FDIC

recently estimated that as many as one third of bank failures involve insider fraud and abuse, while "outright criminal activity is a factor in nearly 15 percent of recent failures" (Statement of L. William Seidman, Chairman, FDIC, Before the Subcomm. on Commerce, Consumer and Monetary Affairs of the House Comm. on Government Operations 1 (Nov. 19, 1987)). In 1984, the House Committee on Government Operations stated that "[c]riminal misconduct by insiders of financial institutions has been a major contributing factor in approximately one-half of all commercial bank failures * * * between 1980 and 1983." H.R. Rep. 98-1137, 98th Cong., 2d Sess. 7 (1984). The report accompanying the 1978 legislation that, among other things, modified Section 1818(g) in response to *Feinberg*, explained that Congress was tightening controls on bank officers, directors and shareholders because "[p]roblem banks and insider abuses have been virtually synonymous." H.R. Rep. 95-1383, 95th Cong., 2d Sess. 10 (1978).

Mallen's case presents a clear example of the dangers of insider misconduct. Mallen was accused (and subsequently convicted) of making false statements on an FDIC financial disclosure form, the FDIC maintained that he concealed his own interests in certain entities that borrowed from Farmers State Bank (see Aff. of FDIC Review Examiner Bruce Holmgren (attached to Feb. 9, 1987 FDIC Opp. to Temp. Relief); see also J.A. 17 (indictment); cf. *Langley* v. *FDIC*, No. 86-489 (Dec. 1, 1987), slip op. 4-5 (importance of accurate information to FDIC)). Because it gives bank managers a financial interest as borrowers that may be contrary to the interests of depositors, lending to officers and directors is strictly limited (see Iowa Code Ann. §§ 524.612, 524.613, 524.706, 524.710 (West 1970 & Supp. 1987) (limits on loans to and overdrafts by officers and directors of Iowa banks); 12 U.S.C. 1828(j)(2) (limits on loans to officers and directors of federally-insured state

banks)); attempts to evade those regulations through false statements are unacceptable. See, *e.g.*, *United States* v. *McCright*, 821 F.2d 226, 231-233 (5th Cir. 1987) (upholding conviction under 18 U.S.C. 1005 for false statements regarding bank officer's interest in loan recipients), petition for cert. pending, No. 87-553; *First Nat'l Bank* v. *Comptroller*, 697 F.2d 674, 683 (5th Cir. 1983). The public and the FDIC, whose insurance fund bears the financial risk of bank failure, must be able to repose absolute confidence in bank managers.

Congress was amply justified in concluding that it might require as much as 90 days for an agency to determine with due caution that an indicted officer's continued service would not pose a threat to depositors or public confidence.[18] Where possible, as in this case, the FDIC schedules the hearing to be held in less than 30 days,[19] but the process of preparing for and scheduling a hearing plainly can take the full period.[20] And it is obvious that as much as 60 days might be required for a sound decision favorable to the officer after the hearing.

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[18] The present question is whether the statutory maximum time periods are *ever* justified, because the district court held the schedule inadequate on its face: "[a] facial challenge to [the validity of] a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." *United States* v. *Salerno*, No. 86-87 (May 26, 1987), slip op 5.

[19] Cf. *First Nat'l Bank* v. *Conover*, 715 F.2d 234, 235 (6th Cir. 1983) (Comptroller of the Currency offered a post-suspension hearing within three to five working days, an oral decision 15 days later, and a written decision 30 days later).

[20] The FDIC, which does not employ administrative law judges, must identify an officer (generally a retired administrative law judge) to conduct the hearing. The hearing generally involves live testimony: it is the FDIC Regional Counsels' normal practice to offer oral testimony (subject to cross examination), and not to object to the presentation of oral testimony by the indicted officer (see generally Hearing Tr. 60-61). The hearing itself thus requires advance prepara-

During the 60 days, both the hearing officer and the FDIC Board of Directors must act. The hearing officer must sift the evidence and the parties' submissions; these may concern troublesome issues of bank regulation, including the financial situation of the bank and the opportunity for a particular officer or director to endanger depositors. The hearing officer must prepare a proposed disposition that fairly sets out the circumstances and his views. The regulations provide for this process to be expedited when it can be: "where possible," the proposed disposition is to be submitted to the FDIC "within 10 days after the record is closed" (12 C.F.R. 308.61(h)). That proposed disposition must then be reviewed (normally after preparation of an analysis by FDIC legal staff not previously involved in the case) by the Board of Directors of the FDIC (12 C.F.R. 308.62), a collegial body with extensive other responsibilities. Congress's conclusion that this process may take up to 60 days was plainly reasonable.[21]

(iii) Finally, under the circumstances "the risk of an erroneous deprivation" (J.S. App. 9a (quoting *Mathews* v. *Eldridge*, 424 U.S. at 335)) is small. The principal fact supporting suspension—the existence of probable cause to believe that the officer has committed a felony—will have been determined by a grand jury, whose determination not only provides an "initial check against mistaken decisions" (*Loudermill*, 470 U.S. at 545-546), but must be taken as given for purposes of a Section 1818(g) suspension. The remaining statutory requirement for suspension is—deliberately—easy to meet: whether the officer's continued service "may" pose a "threat" to the interests of depositors "or" public confidence. While the agency may, after careful consideration, decide that it is safe to allow the indicted officer to return to the bank, the likelihood that its initial decision was overcautious is very small.

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tion by, and must be scheduled at a time mutually convenient to, a number of people with other responsibilities. See generally 12 C.F.R. 308.55 *et seq.*

[21] In *United States* v. *Thirty-Seven Photographs*, 402 U.S. 363, 373-375 (1971), this Court read into a statute, and found constitutional, a time period of 60 days for a district court to adjudicate a seizure application. In an FTC adjudication the administrative law judge generally is to file an initial decision within 90 days after the end of the hearing (16 C.F.R. 3.51); if there is no appeal that decision becomes the FTC's determination after another 30 days (*ibid.*). In a Consumer Products Safety Commission adjudication the Presiding Officer is to "endeavor to file an Initial Decision with the Commission within sixty (60) days after the closing of the record or the filing of post-hearing briefs, whichever is later" (16 C.F.R 1025.51). Absent an appeal, the Initial Decision becomes final 40 days after issuance (16 C.F.R. 1025.52).

B. The District Court's Reliance On *Barry* v. *Barchi* Was Misplaced

The district court's conclusion that the time limits in Section 1818(g)(3) were not prompt enough to satisfy due process turned, not on a balancing of the competing interests, but primarily upon its analogy to *Barry* v. *Barchi*, *supra*. *Barry* involved a 15-day suspension of the license of a horse trainer whose horse had allegedly failed a post-race drug test. The statutue provided for a post-suspension hearing but did not specify when the hearing must be convened, although it required a decision within 30 days after the hearing (443 U.S. at 59-61). This Court held that the hearing was insufficiently prompt for "relatively brief suspensions" because it was likely to take place after the licensee had incurred "the full penalty imposed" (*id.* at 66), denying the trainer any effective review. The district court in this case concluded that Section 1818(g) suffered from the same defect. The court reasoned that, since the Speedy Trial Act, 18 U.S.C. 3161(c)(1), requires that a criminal trial begin within 70 days (plus any "excludable time") after indictment, a suspended officer's criminal trial would

generally be over, and his Section 1818(g) suspension ended, before the banking agency would have to decide the bank official's challenge to his suspension. J.S. App. 12a-13a.

The district court's reliance on *Barry* was wholly misplaced. First, the premise is wrong: where the criminal case is not terminated by a guilty plea but goes to trial, a Section 1818(g) suspension will normally last longer than 90 days, often substantially longer. The 70-day period provided for by the Speedy Trial Act is subject to several categories of "excludable time" (18 U.S.C. 3161(h)) and a great many criminal trials, including Mallen's, have taken more than 90 days from indictment to verdict.[22] More importantly, a Section 1818(g) suspension order remains in effect, unless terminated by the agency, "until such * * * indictment * * * is *finally* disposed of * * *" (12 U.S.C. 1818(g)(1) (emphasis added)). As the structure of Section 1818(g)(1) makes clear, where the trial leads to a conviction, the case is not "finally disposed of" until the completion of the appellate process: the ensuing remedy, permanent removal after conviction, may not be imposed until the conviction is no longer subject to appellate review. The district court in *Feinberg* understood this point and noted that "such a final disposition, considering the possible appellate avenues, presents the possibility of a substantial passage of time" (420 F. Supp. at 119).

Second, and more fundamentally, *Barry* was altogether unlike this case. What troubled the Court in *Barry* was that a penalty could be imposed on a trainer suspected of misconduct, without any effective opportunity for the trainer to challenge the penalty, because it was "as likely as

[22] In the year ending June 30, 1986, federal criminal prosecutions involving jury trials had a median time between indictment and judgment in the district court of 5.4 months. Director of the Administrative Office of the United States Courts Ann. Rep., Table D-6, at 267 (1986).

not that Barchi and others subject to relatively brief suspensions would have no opportunity to put the State to its proof until they [had] suffered the full penalty imposed" (443 U.S. at 66). There is no such lack of opportunity under Section 1818(g). A Section 1818(g) suspension is based on two premises—the criminal charge and the possible threat to depositors or public confidence—each of which is subject to appropriate subsequent proceedings in its own forum. The fact that in some cases a judgment of acquittal (or dismissal of the indictment) will end the suspension before the agency issues its decision under Section 1818(g)(3) has no bearing on the reasonableness of the time allowed for that process where it must be carried to its conclusion. The district court's holding that the Section 1818(g)(3) process is unreasonably long, merely because the criminal process might in some cases finish sooner, was wholly illogical.

C. Section 1818(g)'s Grant Of Discretion To The Banking Agencies To Decide Whether To Receive Oral Testimony At The Suspension Hearing Is Constitutional

Section 1818(g)(3) provides that the suspended official shall have an opportunity to "submit written materials (or, at the discretion of the agency, oral testimony) and oral argument." The FDIC's regulations delegate the question whether to receive oral testimony to the hearing officer (12 C.F.R. 308.61(e)). In this case, since Mallen successfully challenged Section 1818(g) on its face before the hearing date, there was no decision by the hearing officer on whether to permit oral testimony.[23] The district court,

[23] The FDIC Regional Counsel stated in a February 2, 1987 letter his belief that oral testimony was not required in Mallen's impending suspension hearing (J.A. 28-30; see note 4, *supra*). Under the regulations, however, the decision is to be made by the hearing officer, who was "considering allowing the parties to present [oral] evidence" (J.S. App. 14a n.6). See also Hearing Tr. 60-61.

essentially without explanation, ruled that Section 1818(g) is unconstitutional because it does not mandate the receipt of oral testimony on behalf of the suspended officer in all instances (J.S. App. 14a-16a).

Although, as we have noted, FDIC Regional Counsels normally do not object to oral testimony on behalf of the bank officer (and normally present oral testimony, subject to cross examination, to support the suspension), Section 1818(g)(3) is plainly not facially unconstitutional for failure to require the agency to accept oral testimony in every case. In the first place, as this Court has held repeatedly, " 'due process is flexible and calls for such procedural protections as the particular situation demands.' " *Greenholtz* v. *Nebraska Penal Inmates*, 442 U.S. 1, 12 (1979) (quoting *Morissey* v. *Brewer*, 408 U.S. 471, 481 (1972)). While written submissions have been held to be an unrealistic and inadequate option in particular situations (see, *e.g.*, *Goldberg* v. *Kelly*, 397 U.S. 254, 269 (1970) (welfare recipients)), there is no reason to think that written submissions plus oral argument are universally inadequate for suspended bank officers, particularly since the criminal charge is not at issue. The FDIC's decision, whether the suspended officer's continued service poses a threat to the interests of depositors or public confidence in the bank, may depend solely on record facts (such as the condition of the bank and the nature and responsibilities of the officer's position) plus expert agency judgment, and not at all on the credibility of the suspended officer or his supporters. " '[T]he nature of the relevant inquiry,' * * * does not seem to require any more than written submission" (*Feinberg*, 420 F. Supp. at 120 (citation and footnote omitted)). Cf. *Mathews*, 424 U.S. at 343; *Califano* v. *Yamasaki*, 442 U.S. 682, 695-696 (1979); *Greenholtz* v. *Nebraska Penal Inmates*, 442 U.S. at 14-15. Section 1818(g)(3) does give the suspended officer in all cases the right to present oral argument, as suggested in *Feinberg*, so that he has the opportunity "to mold his argument to

the issues the decision maker appears to regard as important" (*Goldberg* v. *Kelly*, 397 U.S. at 269).

More fundamentally, in any case where the question whether the indicted officer's continued service poses a threat to depositors or public confidence *does* turn on the credibility of the officer or his witnesses, the hearing officer will presumably hear oral testimony, as hearing officers commonly do in Section 1818(g)(3) hearings. The district court's invalidation of the statute on its face, without either finding that oral testimony was constitutionally required in this instance[24] or awaiting the hearing officer's decision, was wholly unjustified.

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[24] The district court came no closer to finding a particular need for oral testimony in this instance than the observation that public confidence, which it thought the proper subject of live testimony, might be more easily undermined by the suspension than by the indictment of a bank president "in a small town such as Kanawha, Iowa" (J.S. App. 15a). The court did not mention the lengthy evidentiary hearing that was the reason why the FDIC Regional Counsel had suggested that in this instance an oral hearing might be unnecessary.

CONCLUSION

The judgment of the district court should be reversed.
Respectfully submitted.

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OCTOBER TERM, 1987

FEDERAL DEPOSIT INSURANCE CORPORATION,
Appellant,

v.

JAMES E. MALLEN, ET AL.

On Appeal From The United States District Court For The Northern District Of Iowa

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In addition to the constitutional and statutory provisions provided in Appellant's brief, all of which Appellee believes to be relevant, Appellee provides the following statutory provisions:

12 U.S.C. 1818(e)(1):

> Whenever, in the opinion of the appropriate Federal banking agency, any director or officer of an insured bank has committed any violation of law, rule, or regulation or of a cease-and-desist order which has become final, or has engaged or participated in any unsafe or unsound practice in connection with the bank, or has committed or engaged in any act, omission, or practice which constitutes a breach of his fiduciary duty as such director or officer, and the agency determines that the bank has suffered or will probably suffer substantial financial loss or other damage or that the interests of its depositors could be seriously prejudiced by reason of such violation or practice or breach of fiduciary duty or that the director or office[1] has received financial gain by reason of such violation or practice or breach of fiduciary duty, and that such violation or practice or breach of fiduciary duty is one involving personal dishonesty on the part of such director or officer, or one which demonstrates a willful or continuing disregard for the safety or soundness of the bank, the agency may serve upon such director or officer a written notice of its intention to remove him from office.

12 U.S.C. 1818(e)(4):

> In respect to any director or officer of an insured bank or any other person referred to in paragraph

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[1] So in statute as enacted. The word "office" should probably read "officer." (footnote in original).

(1), (2), or (3) of this subsection, the appropriate Federal banking agency may, if it deems it necessary for the protection of the bank or the interests of its depositors, by written notice to such effect served upon such director, officer, or other person, suspend him from office or prohibit him from further participation in any manner in the conduct of the affairs of the bank. Such suspension or prohibition shall become effective upon service of such notice and, unless stayed by a court in proceedings authorized by subsection (f) of this section, shall remain in effect pending the completion of the administrative proceedings pursuant to the notice served under paragraph (1), (2), or (3) of this subsection and until such time as the agency shall dismiss the charges specified in such notice, or, if an order of removal or prohibition is issued against the director or officer or other person, until the effective date of any such order. Copies of any such notice shall also be served upon the bank of which he is a director or officer or in the conduct of whose affairs he has participated.

STATEMENT OF FACTS

Prior to his January 20, 1987 suspension by the Federal Deposit Insurance Corporation ("FDIC"), Appellee James E. Mallen ("Mallen"), was the president, a director and the largest stockholder of the Farmers State Bank, Kanawha, Iowa ("Bank"), a small bank located in an agricultural community having a population of approximately 750 people (Joint Appendix, 2).[2] Mallen had held the position of president of the Bank continuously for 18 years prior to his suspension pursuant to 12 U.S.C. 1818(g) ("§ 8(g) suspension") (J. App., 3).

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[2] References to the Joint Appendix shall hereafter be cited as "J. App. ____"

On May 20, 1986, the FDIC issued a Notice of Intention to Remove From Office and to Prohibit From Further Participation against Mallen, pursuant to 12 U.S.C. § 1818(e) ("§ 8(e) removal") (J. App., 3). The FDIC's removal notice was based upon transactions occurring between 1979 and 1982 (J. App., 3). These transactions also ultimately formed the basis for Mallen's indictment on December 10, 1986, which charged Mallen with the misrepresentation or concealment of material facts in a January 15, 1982 personal financial statement and misrepresentation or concealment of material facts in an officer's questionnaire dated November 22, 1982. (J. App., 17-18). Section 8(e) afforded Mallen the right to an administrative hearing before an administrative law judge prior to any removal. This administrative removal hearing was convened in September of 1986 but was not completed, as the administrative law judge recused himself at the beginning of Mallen's defense (J. App., 3).

12 U.S.C. § 1818(e)(4) ("§ 8(e)(4)") confers upon the FDIC the authority to immediately suspend a bank officer if such action is deemed "necessary for the protection of the bank or the interests of its depositors." Had the FDIC proceeded pursuant to § 8(e)(4), Mallen would have been removed from the Bank until a final decision was issued in the § 8(e) removal proceeding. At no time from the commencement of the removal proceeding on May 20, 1986 through the date of the FDIC's issuance of its § 8(g) suspension on January 20, 1987, the action upon which this case is predicated, did the FDIC act to suspend Mallen pursuant to the provisions of § 8(e)(4) (J. App., 4), notwithstanding the striking similarity between the standards for a § 8(e)(4) suspension and a § 8(g) suspension.

Mallen received notice of his § 8(g) suspension on January 26, 1987 (J. App., 11). The suspension order merely

alleged, reciting the language of § 8(g), that the FDIC had determined that Mallen's "continued service or participation . . . in the conduct of the affairs of the bank may pose a threat to the interests of the bank's depositors or may threaten to impair public confidence in the bank." (J. App., 19). Mallen was not informed, and has never been informed, as to the facts supporting this conclusion (J. App., 12). The FDIC's suspension order was issued without prior notice to Mallen, on an ex parte basis without any formal or informal pre-suspension proceedings, and almost two months after the issuance of the indictment which formed the predicate for the suspension (J. App., 4-5). Mallen's indictment on December 10, 1986 by a Federal grand jury received wide publicity in northern Iowa. Although many customers of the Bank were aware of the indictment, there was no run on the Bank's deposits, as might be expected if the indictment had resulted in an erosion of public confidence in the Bank, or Mallen as its president (J. App., 6). Neither Mallen nor the Bank was ever given an opportunity to present any evidence or argument to the FDIC prior to the issuance of the suspension order (J. App., 12).

On January 30, 1987, attorneys for Mallen corresponded with the Executive Secretary of the FDIC demanding an immediate administrative hearing with both oral testimony and written evidence (J. App., 25-27). On February 2, 1987, the Regional Counsel for the FDIC in Kansas City, who had represented the FDIC in the § 8(e) hearing concerning Mallen's removal and was designated by the FDIC to represent the agency in Mallen's § 8(g) suspension hearing, corresponded with the Executive Secretary of the FDIC and Mallen's attorneys urging, *inter alia*, that no oral testimony be taken at the suspension hearing, that the hearing not commence until on or

after February 25, 1987, and that Mallen's requested hearing date of February 9, 1987, was unrealistic because of the inability to locate a qualified hearing official by that date (J. App., 28-31). On February 4, 1987, the Deputy Executive Secretary of the FDIC responded to Mallen's January 30, 1987 request for an immediate hearing and indicated that an administrative law judge had been appointed to conduct the § 8(g) proceeding. This letter also stated that the hearing would be held within 30 days of the FDIC's issuance of the § 8(g) Suspension Notice, but did not respond to Mallen's request for a hearing on February 9, 1987, (J. App., 32-33). On February 5, 1987, counsel for Mallen reiterated his request for a hearing to commence on February 9, 1986, and to include oral testimony, documentary evidence and written submissions (J. App., 34-35). In this correspondence, counsel for Mallen consented to the appointment of the designated administrative law judge.

As of Friday, February 6, 1987, neither Mallen nor his counsel had been informed of the scheduling of a hearing on Mallen's § 8(g) suspension (J. App., 13). Accordingly, Mallen's complaint and application for temporary restraining order were filed on February 6, 1987, in the United States District Court for the Northern District of Iowa (J. App., 2-9).

I. THE POST-SUSPENSION PROCEDURES SET FORTH IN 12 U.S.C. § 1818(g)(3) DO NOT COMPORT WITH DUE PROCESS.

The FDIC does not contend that Mallen's interest in his continued employment at the Bank is not a "property" right protected by the Fifth Amendment of the United States Constitution. In turn, Mallen does not contend that his suspension from that position, pursuant to § 8(g),

requires a *pre*-deprivation hearing. The issue before the Court is the adequacy of the *post* deprivation procedures outlined in § 8(g) to protect Mallen's admitted due process rights. The United States District Court for the Northern District of Iowa has determined that § 8(g) does not comport with the due process requirements of the Fifth Amendment because (a) the hearing provided for in § 8(g) does not occur at a meaningful time and (b) the rules under which that hearing is conducted do not provide an opportunity to present or cross examine witnesses.[3]

It is well established that procedural due process imposes constraints on governmental decisions which deprive individuals of liberty or property interests within the meaning of the due process clause of the Fifth or Fourteenth Amendments. *Mathews* v. *Eldridge*, 424 U.S. 319, 332 (1976). The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner. *Id.* at 333, citing *Armstrong* v. *Manzo*, 380 U.S. 545 (1965). The requirements of the due process clause, unlike some legal rules, are not technical conceptions with fixed content unrelated to time, place and circumstances. *Cafeteria Workers* v. *McElroy*, 367 U.S. 886, 895 (1961). Rather, due process is flexible

[3] Appellant's Brief notes that the District Court did not make clear in entering its injunction whether that injunction was preliminary or permanent. (Appellant Brief, 9 (hereinafter "App. Br. ____"), n. 7). However, in *Walters, Administrator of Veterans Affairs, et al.* v. *National Association of Radiation Survivors, et al.*, 473 U.S. 305 (1985), which also involved an appeal to this Court pursuant to 28 U.S.C. § 1252, this Court held that § 1252 applies to interlocutory as well as final judgments and that the jurisdiction of this Court, pursuant to § 1252, was properly invoked even if the District Court's injunctive action was interlocutory rather than final. (*Id.* at 316-317, citing *McLucas* v. *DeChamplain*, 421 U.S. 21 (1975)).

and calls for such procedural protection as particular situations demand. *Morissey* v. *Brewer*, 408 U.S. 471, 481 (1972); *U.S.* v. *Eight Thousand Eight Hundred and Fifty Dollars in United States Currency*, 461 U.S. 555, 564 (1983); *Mathews* v. *Eldridge*, 424 U.S. at 344; *Goldberg* v. *Kelly*, 397 U.S. 254, 263 (1970); *Goss* v. *Lopez*, 419 U.S. 565, 578 (1975).

In *Mathews* v. *Eldridge*, the Court outlined a three pronged test for determining the specific requirements of due process in a particular situation. Those factors are: the private interest that will be affected by the official action; the risk of an erroneous deprivation of such interests through the procedures used and the probable value, if any, of additional or substitute procedural safeguards; and the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. Mallen believes that an analysis of these factors clearly indicates that the procedure established in § 8(g)(3) does not meet minimal requirements of due process.

The private interest involved is Mallen's right to continued employment. This Court has already determined that this interest is substantial. *Barry* v. *Barchi*, 433 U.S. 55 (1979); *Brock* v. *Roadway Express, Inc.*, 481, U.S. ____, No. 85-1530 (1987); *Cleveland Board of Education* v. *Laudermill, et al.*, 470 U.S. 532 (1984); *Logan* v. *Zimmeran Brush Company*, 455 U.S. 422 (1982); *Arnett* v. *Kennedy*, 416 U.S. 134 (1974). This is especially true since Mallen's indictment, a necessary predicate to his suspension, imposes extraordinary economic hardships upon him and his family. The cost of defending a pending criminal action is substantial. Simultaneous denial of an income stream to underwrite these extraordinary expenses can

be crucial, not only to Mallen's financial condition in general, but to his ability to pay for his criminal defense.

The FDIC suggests that Mallen's interest in continued employment was somehow diminished by the fact of his indictment, that Congress intended suspensions of similarly situated bank officers to be "virtually routine" and that what Mallen has at stake in his post-suspension hearing is "only the chance of persuading the agency that, despite the indictment, he poses no threat to depositors or public confidence." (App. Br., 16). For numerous reasons, Mallen rejects this trivalization of his right to continue to practice his chosen profession.

The fact of Mallen's indictment is a condition precedent to the FDIC's discretionary decision to suspend him.[4] The FDIC's Rules of Procedure applicable to § 8(g) suspensions specifically state that "the Board shall not consider the guilt or innocence of the individual charged with the crime" in its decisiion whether to suspend.[5] The FDIC's legitimate interest in regulating the continued presence of indicted individuals in federally insured banks is the reason a *post*-suspension hearing, rather than a pre-suspension hearing, was mandated by Congress. However, there is a major difference between suggesting that the legitimate government interest involved mandates that suspension come first and due process later, and suggesting that due process may be done away with entirely. As this Court has previous'y stated, where the Court has rejected the need for a hearing prior to the "taking," a principal rationale has been that a hearing would be pro-

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[4] § 8(g) states that upon indictment by a United States attorney for a crime involving dishonesty or breach of trust, the appropriate federal banking agency *may* choose to suspend.

[5] 12 C.F.R. § 308.56(a)(2).

vided before the taking became final, *Arnett* v. *Kennedy*, 416 U.S. at 178. The fact of Mallen's indictment does not exclude him from this basic constitutional guarantee.

The FDIC's observation that Congress intended such suspensions to be "virtually routine," was rejected by the United States District Court for the District of Columbia in *Feinberg* v. *FDIC*, 420 F.Supp. 109 (D.D.C. 1976), when § 8(g) was first declared unconstitutional. *Id.* at 117, n.19. In fact, in response to the FDIC's identical assertions in *Feinberg*, the District Court observed that Congress itself had emphasized that "to permit suspensions and removals without thorough consideration would be unfair to the institution and officers involved. Any system that would permit this would have a harmful effect on the banking system itself and on depositors, borrowers and the public." *Id.* at 120 (citing S.Rep. No. 1482, 89th Cong. 2nd Sess. (1966)). Moreover, since the suspension here is committed to the discretion of a federal agency, the Constitution requires post-termination procedures that are sufficient to provide a check against initially mistaken decisions. *Cleveland Board of Education* v. *Laudermill, et al.*, 470 U.S. at 553-554, (Brennan, J., concurring in part and dissenting in part).[6]

The second factor considered by the Court in *Mathews* v. *Eldridge* was the risk of an erroneous deprivation as a result of the procedures used, and the probable value, if any, of additional or substitute procedural safeguards. The FDIC suggests to this Court that the risk of an

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[6] Although Justice Brennan's observations in this case concerned post-termination procedures, Mallen believes they are equally applicable, and in fact more crucially so, when there is no pre-termination procedure and post-termination procedures are dispositive.

erroneous deprivation is quite low because the grand jury's evaluation of the accusations against Mallen must be taken as given. However, this assertion not only misses the point of a post-suspension hearing in general, but misstates the statutory purpose of the particular post-suspension hearing provided for in § 8(g). It should be axiomatic that Mallen is innocent until proven guilty. This is presumably why the FDIC's own Rules of Procedure exclude consideration of Mallen's guilt or innocence from the post-suspension hearing. What is at issue in this hearing is whether Mallen's continued service at the Bank poses a threat to the interests of the Bank's depositors or may threaten to impair public confidence in the Bank. While the necessary predicate for a suspension is the issuance of an indictment, the suspension itself is conditioned upon a finding that the individual poses a threat to the interests of the Bank's depositors. If Congress had intended the indictment itself to support suspension, the suspension would not be discretionary and additional criteria unnecessary. *See*, *Feinberg* v. *FDIC*, 420 F.Supp. at 116-118.

The FDIC suggests that because the statutory requirement for suspension is allegedly easy to meet, there is but a small likelihood that Mallen's property rights will be erroneously deprived. However, this Court has previously rejected similar assertions stating that

> The right to be heard does not depend on advance showing that one will surely prevail at the hearing. To one who protests against the taking of his property without due process of law, it is no answer to say that in his particular case due process of law would have lead to the same result because he had no adequate defense upon the merits. *Fuentes* v. *Shevin*, 407 U.S. 67, 87 (1972) citing *Coe* v. *Armour Fertilizer Works*, 237 U.S. 413, 424 (1914).

Additionally, the risk of an erroneous deprivation is heightened in this case because of the total lack of any pre-deprivation procedures. In *Barry* v. *Barchi*, for example, this Court found post-deprivation procedures constitutionally defective notwithstanding the fact that, prior to suspension, Barchi was given more than one opportunity to present his side of the story to State investigators, including the results of two lie detector tests, and had clearly been made aware of the pertinent facts and circumstances upon which the decision to suspend him was based. Similarly, and in numerous cases, this Court has looked to the nature of pre-deprivation proceedings, using the *Mathews* v. *Eldridge* test, to determine the likelihood that an erroneous deprivation could occur.[7]

In this case, there were no pre-deprivation proceedings whatsoever. Approximately two months after his indictment, Mallen received a summary notice from the FDIC informing him of his immediate suspension and citing in support thereof only the conclusory language of the statute "that continued service or participation by respondent in the conduct of the affairs of the bank may pose a

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[7] *See*, *Mathews* v. *Eldridge*, 424 U.S. 319, questionnaire sent to disability recipient concerning continuation of disability, consideration of facts by State agency, notice to disability recipient as to reasons for preliminary determination to terminate disability, opportunity to submit additional information and final determination by agency; *Goldberg* v. *Kelly*, 397 U.S. 254, discussions with welfare case worker, 7 days notice of proposed termination of benefits, pre-termination review by higher agency official and right to submit written statements prior to termination; *Arnett* v. *Kennedy*, 416 U.S. 134, written notice of reason for discharge of federal employee and right to reply orally or in writing to the charges; *Mitchell* v. *W.T. Grant Company*, 416 U.S. 600 (1974) issuance of writ of sequestration ex parte upon verified affidavit, judge's authority and the posting of a sufficient bond, with right of debtor to immediately seek dissolution.

threat to the interests of the bank's depositors or may threaten to impair public confidence in the bank." (J. App., 19). Mallen was never afforded an opportunity to discuss this conclusion with any representative of the FDIC and was never informed by the FDIC as to the facts which caused it to reach this conclusion. There is no provision either in the statute or in the FDIC's Rules of Procedure which provide that Mallen be notified that suspension is being considered, that he be allowed any informal discussions with agency officials prior to such suspension or giving him any input whatsoever into the fact-finding process which must underlie a suspension. The FDIC's Rules of Procedure do not even require that Mallen be informed of the facts which caused the agency to conclude that his continued presence in the Bank may pose a threat to the Bank's depositors.[8]

This Court has previously observed that when prompt post-deprivation review is available for the correction of administrative error, pre-deprivation procedures need only be designed to provide a reasonably reliable basis for concluding that the facts justifying the official action are as a responsible government official warrants them to be. *Mackey* v. *Montrym*, 443 U.S. 1, 13 (1979). Mallen is not suggesting that the procedures of § 8(g) are constitutionally defective because of the lack of any pre-deprivation input whatsoever. Rather, Mallen suggests that the

[8] 12 C.F.R. § 308.59 does require that Mallen be informed that he has thirty days to submit a written request for a hearing. This regulation requires that Mallen's written request specify "the relief desired and the grounds therefore" and be accompanied by "supporting evidence when available." It is difficult to comprehend how one might respond to this regulatory requirement when one has never been informed as to the factual basis for the suspension in this first instance.

total absence of any opportunity for pre-deprivation input, when coupled with the absence of any factual information as to the basis for the agency's decision to suspend, place additional burdens on both the form and timing of any post-suspension proceeding.

Section 8(g) stands in opposition to the majority of the cases considered by this Court concerning the requirements of due process. Although this Court has clearly stated that each case is to be considered on its own particular facts and that the requirements of due process are to some extent unique to each, the Court has consistently undertaken an analysis of both pre and post deprivation procedures and considered these procedures in their totality.[9] The absence of any pre-deprivation procedures whatsoever not only increases the likelihood of an erroneous deprivation but renders the nature of the post-deprivation procedures crucial. The constitutional right to be informed of the charges against one and to respond to those charges is basic. It is only at the post-deprivation hearing that indicted officials are first informed as to the factual basis for the suspension and this hearing provides their only opportunity to respond.

The FDIC cannot reasonably contend that because Mallen's *ex parte* suspension was initiated by duly authorized government officials, the determination of these officials is somehow less prone to error. No matter how well motivated these officials might have been, the due process clause was designed "to protect the fragile values of a vulnerable citizenry from the overbearing concern for

[9] See, *Cleveland Board of Education* v. *Loudermill*, 470 U.S. at 551 (Marshall, J., concurring in part and concurring in the judgement); *Mackey* v. *Montrym*, 443 U.S. at 21; *Brock* v. *Roadway Express, Inc.*, 956. L.Ed. 2d at 250.

efficiency and efficacy that may characterize praiseworthy governmental officials no less, and perhaps more, then mediocre ones." *Fuentes* v. *Shevin*, 407 U.S. at 91, n.22.

Given the admitted necessity of expedited action by government officials pursuant to § 8(g), the best protection against erroneous deprivation is an immediate and meaningful post-deprivation hearing.

> For once a person has an opportunity to speak up in his own defense, and when the state must listen to what he has to say, substantively unfair and simply mistaken deprivations of property interests can be prevented. It has long been recognized that 'fairness can rarely be obtained by secret, one sided determination of facts decisive of rights . . . [and n]o better instrument has been divised for arriving at truth then to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it.'" *Id.*, at 81, citing *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123, 170-172, (Frankfurter, J., concurring).

Finally, the last factor in *Mathews* v. *Elridge* requires consideration of the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail. The FDIC quite correctly urges this Court to consider the "dangers to banks and their depositors potentially arising from continued participation in their affairs by persons indicted for serious crimes." (App. Br., 19). But this interest is adequately protected by the summary suspension authority contained in § 8(g). The FDIC next suggests that the 90 day time period provided for in § 8(g) was chosen by Congress in order to ensure the due process rights of indicted officials. (App. Br., 21). Mallen believes this argument to be disingenuous at best.

The Speedy Trial Act, 18 U.S.C. 3161 *et seq.*, requires that a criminal trial begin within a minimum of 70 days. Section 8(g) mandates that post-deprivation proceedings be concluded within 90 days of the FDIC's receipt of a request to appear before the agency and challenge the suspension.[10] If the federal government can reasonably be expected to try a criminal case within 70 days of indictment the FDIC should be able to conclude a post-suspension hearing on a single discreet issue within a shorter time frame.

As previously stated, due process requires an opportunity to be heard at a meaningful time. *Armstrong* v. *Manzo*, 380 U.S. at 552. In *Barry* v. *Barchi*, this Court held that when an individual has no opportunity to put the state to its proof until he has suffered the full penalty imposed by the law, he has not received due process. (443 U.S. at 66). In an effort to distinguish this Court's holding in *Barry* v. *Barchi*, the FDIC suggests that suspension pursuant to § 8(g) continues until an indictment is finally disposed of, is inclusive of any appeals, and that it is therefore likely that the hearing of a § 8(g) suspension will be concluded before the § 8(g) suspension becomes irrelevant. The FDIC's argument in this regard is faulty for a number of reasons. First, if the indicted individual is acquitted, the suspension automatically terminates regardless of the status of the administrative proceeding. Second, if the individual is convicted, the FDIC's argu-

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[10] As to the agency's suggestion that many criminal trials do not take place within the 70 day parameters of the Speedy Trial Act, Mallen considers this observation to be irrelevant. Mallen possesses a consitutional right to a speedy criminal trial as well as a constitutional right to due process of law in connection with his suspension. He cannot and should not be required to waive one in order to secure the other.

ment presupposes an appeal. Third, and perhaps most importantly, if the individual is convicted, 12 U.S.C. § 1829 operates to automatically remove him from his position as an officer, director or employee of any insured bank immediately, notwithstanding any appeal, thereby mooting any continuing administrative proceeding under § 8(g) with respect to anyone who is not also a principal shareholder of the bank in which he is employed.[11]

In support of the injunction of the Court in *Mathews* v. *Eldridge* to consider the interests of the government, the FDIC suggests that the process of preparing for and scheduling a hearing and reaching a sound decision may well necessitate the full 90 days. The FDIC asserts that the hearing may concern troublesome issues of bank regulation, including the financial situation of the bank and the opportunity for a particular officer or director to

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[11] § 8(g) operates to suspend an individual from service as an officer or director in a bank and to prohibit him from participating in any manner in the conduct of the affairs of the bank. The latter "participation" language has been generally interpreted to preclude the right to vote ones stock in an institution. In contrast, 12 U.S.C. § 1829 does not speak of "participation in the conduct of the affairs of the bank" but only service as an officer, director or employee. Accordingly, and in this one regard, § 8(g) can be considered to be broader in scope than § 1829. Conversely, while the suspension pursuant to § 8(g) affects an individual only with respect to a financial institution where he was employed or owns stock at the time of the indictment, the prohibitions of § 1829 preclude service as an officer, director or employee of *any bank* whose deposits are insured by the FDIC. In this latter regard, therefore, § 1829, while narrower in the nature of its prohibitions, is broader in application of those prohibitions. Accordingly, if an individual did not own stock in the financial institution where he was employed at the time an § 8(g) suspension, his conviction would immediately operate to moot any hearing on that suspension, because of the prohibitions of § 1829 and notwithstanding any appeal.

endanger the depositors. The agency then lists a panoply of officials who can or must review the hearing officer's decision and observes that many of these officials have "extensive other responsibilities." (App. Br., 28). However, in explaining why the risk of an erroneous deprivation is small, the FDIC states that the statutory requirement for suspension is easy to meet. (App. Br., 29). Mallen does not believe that the FDIC can have it both ways. Notwithstanding this apparent attempt to argue both sides of the street, *some* meaningful hearing must take place at *some* time before the deprivation is irreversible, notwithstanding any administrative inconcenience. Although it is well established that administrative efficiency is one consideration in the analysis of the sufficiency of due process safeguards, "[p]rocedural due process is not intended to promote efficiency or accommodate all possible interests; it is intended to protect the particular interest of the person whose possessions are about to be taken." *Fuentes* v. *Shevin*, 407 U.S. at 90, n.22. Although due process may tolerate variances in the form of a hearing appropriate to the nature of the case, and consideration must be given to the importance of the interests involved, an opportunity for a hearing must be provided before deprivation is irreverisible. *Id.* at 82; *Mackey* v. *Montrym*, 443 U.S. at 21.

In *Logan* v. *Zimmerman Brush Company*, 455 U.S. 422, this Court reviewed a state law which required a fact-finding conference within 120 days of discharge from employment. The conference was to take place under control of the State Fair Employment Practices Commission, and was between the discharged employee as plaintiff and the discharging employer as respondent. When the conference did not take place within 120 days, respondent moved to dismiss the complaint because of the

Commission's failure to hold the conference within the statutorily mandated time. In reversing the State Supreme Court's decision upholding the dismissal of the complaint, this Court held that the due process clause of the Fourteenth Amendment prohibited states from denying a potential litigant use of established adjudicatory procedures, when such an action would be the equivalent of denying him an opportunity to be heard upon his claimed right. *Id.* at 429-430, citing *Boddie* v. *Connecticut*, 401 U.S. 371, 380 (1971). There is a strong parallel between the *Logan* case and the case at issue here. In both situations a mechanism existed which would ostensibly provide the requisites of due process to the individuals concerned. However, because of circumstances extraneous to those procedures (an administrative error in *Logan* and the Speedy Trial Act here) the procedure was rendered meaningless in application. In *Logan*, the Court noted that it was the state's system itself that destroyed a complainant's property interests, by operation of law, whenever the Commission failed to convene a timely conference, *Id.* at 436. It is the invocation of Mallen's right to a speedy trial under the United States Constitution that destroys his property interest here. The FDIC may argue that this is Mallen's choice, and distinguish *Logan* on that basis, but Mallen does not believe that this Court can sanction a requirement that Mallen chose between two constitutionally protected rights.

Similarly, this Court has stated that a statute or rule may be held constitutionally invalid as applied when it operates to deprive an individual of a protected right although its general validity as a measure enacted in legitimate exercise of state power is beyond question. *Boddie* v. *State of Connecticut*, 401 U.S. at 379. At a minimum here, it must be concluded that the Statutory

Scheme of § 8(g) is unconstitutional in its application, as the particular circumstances of this case have operated to deny Mallen any due process whatsoever in connection with his suspension. The FDIC may argue that this situation should not recur with any regularity, and this may be true, but on the other hand, Mallen's circumstances can hardly be expected to be unique.

The FDIC has suggested no legitimate or compelling reason why an immediate post-suspension hearing could not be held.[12] The agency's suggestion that the pendency of a criminal trial somehow lessens its burden to provide a meaningful hearing (App. Br., 17) was disposed of by the District Court in *Feinberg*, which observed that the criminal trial is hardly the proper or timely hearing for the deprivation issue. *Feinberg*, 420 F.Supp. at 118. The FDIC can make no persuasive argument that it is either too costly or burdensome to provide an expedited post-deprivation hearing. Mallen can envision no reason why the timing of the hearing should affect its cost. Similarly, and as also observed by the *Feinberg* Court, there are simply not that many § 8(g) cases.[13]

Finally, in support of its argument concerning the magnitude of the government interests involved, the FDIC

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[12] In fact, the Comptroller of the Currency has offered a § 8(g) post-suspension hearing within three to five working days, an oral decision 15 days later, and a written decision 30 days later. *First National Bank* v. *Conover*, 715 F2d 234, 235 (6 cir. 1983). Appellee is unable to discern why the Comptroller is able to provide what the FDIC cannot or will not.

[13] The *Feinberg* Court noted that in the years 1974 and 1975 nine individuals were suspended pursuant to a notice authorized by § 8(g). Id. at 119, n. 23. The agency has offered no more current information to the Court on § 8(g) suspensions and the number of hearings requested.

suggests that "[t]he same urgency that justifies summary suspension without prior proceedings also justifies allowing the agency enough time to proceed with caution before a suspension is terminated." (App. Br., 25). This argument is in turn premised upon the assertion that "Outright criminal activity is a factor in nearly 15 percent of recent failures." (App. Br., 26). The FDIC asserts that Mallen's case presents a clear example of the dangers of insider misconduct.[14] (App. Br., 26). However, the activities for which Mallen was indicted occurred between 1979 and 1982 (*see*, J. App., 17-18). On May 20, 1986 the agency brought an action pursuant to § 8(e) of the Act to remove Mallen from his office at the Bank based upon allegations which predated and included the allegations contained in the subsequent indictment. (J. App., 4). The initiation of the agency's action pursuant to § 8(e) also afforded the agency an opportunity to suspend Mallen, pursuant to § 8(e)(4), if the agency believed that Mallen's continued presence in the Bank posed a danger to the Bank's depositors. (J. App., 4). Notwithstanding this clear authority to suspend on the basis of a factual finding virtually identical to that eventually made on January 20, 1987 pursuant to § 8(g), the agency declined to suspend Mallen and allowed him to continue in the Bank through the administrative hearing and until approximately two

[14] Notwithstanding these general statistics, the FDIC does not and cannot allege that the failure of the Farmers State Bank in Kanawha, Iowa resulted from either insider abuse or criminal activity. Kanawha, Iowa has a population of approximately 750 people and the town is almost entirely dependent upon agriculture for its economic survival. Approximately 80% of the Bank's loan portfolio was agriculturally related. The Kanawha bank failed because agricultural loan losses exceeded the Bank's capital accounts. The failure of the institution was unrelated in any way, shape or form to the activities of Mallen which resulted in his indictment and conviction.

months after the indictment. Certainly the agency's actions then are inconsistent with its post hoc rationalization now that Mallen's indictment and the facts and circumstances surrounding it posed a threat to the interests of the Bank's depositors.

Mallen believes that *Barry* v. *Barchi* is both controlling and dispositive of the issues presented here. The factual similarities are striking and any factual differences would appear to support the proposition that Mallen's rights were even more seriously compromised than Barchi's. In *Barchi* there was a factual presumption that he was directly or indirectly responsible for the drugging of a race horse. Mallen's indictment results in a presumption that he poses a threat to the Bank. Whereas Barchi was afforded some minimal pre-deprivation process, Mallen was afforded none. What both individuals had at stake was the right to practice their chosen professions and both Appellants argued, in mitigation, that the deprivation was of short duration. Neither Appellee was able to complete the post-deprivation hearing process prior to the termination of his suspension; Barchi because he was reinstated and Mallen because he was convicted and removed pursuant to § 1829.[15] Whereas Barchi was clearly informed in some detail of the facts supporting his suspension and prior to it, Mallen was provided only conclusory allegations citing the language of § 8(g). The factual predicate upon which the FDIC reached the necessary § 8(g) finding that Mallen posed a threat to the Bank's depositors was never disclosed. The decision of the state agency in *Barchi* was reviewable by the State Supreme Court. Decisions of the FDIC pursuant to § 8(g)

[15] *FDIC* v. *Mallen*, 661 F.Supp. 1003 (N.D. Iowa, 1987).

are not reviewable.[16] With respect to the administrative burden, it is a matter of conjecture whether the New York State Racing Board suspends more trainers for drugs on an annual basis than the FDIC suspends bankers for indictments. It would seem logical to assume, however, that the administrative resources of the FDIC far exceed those of the New York State Racing Board. Finally, while this Court felt in *Barchi* that it was in the state's interest to have an early and reliable determination with respect to the integrity of those participating in state supervised horse racing, 443 U.S. at 66, this goal would seem equally as laudable when applied to the integrity of individuals operating financial institutions.

II. SECTION 8(g)'S FAILURE TO GUARANTEE AN OPPORTUNITY TO PRESENT AND CROSS EXAMINE WITNESSES IS CONSTITUTIONALLY DEFECTIVE.

Section 8(g)(3) provides Mallen with the opportunity to appear before the agency to show that his continued service to or participation in the conduct of the affairs of the Bank does not, or is not likely to, pose a threat to the interests of the Bank's depositors or threaten to impair public confidence in the Bank.[17] To facilitate the discharge of this burden of going forward, Mallen is provided with the opportunity "to submit materials (or, at the discretion of the agency, oral testimony) and oral argument." 12 U.S.C. § 1818(g)(3). The FDIC's Rules of Procedure have delegated the decision as to the appropriateness of witnesses and cross examination to the presiding officer. 12

[16] 12 U.S.C. § 1818(h).

[17] Clearly this statute places the burden of proof on Mallen to disprove the findings and conclusions of the agency in support of his suspension.

C.F.R. § 308.61(e). This delegation, however, is conditional and requires that if the presiding officer exercises this discretion, a list of witnesses shall be furnished to the presiding officer prior to the hearing and specified time limits will be placed on oral testimony. 12 C.F.R. § 308.61(e). Mallen believes that the discretionary nature of the decision to allow him to present witnesses, the time limits on testimony and especially a requirement that a list of witnesses be provided prior to the commencement of the proceeding, deny him due process of law.

At the time of his suspension, Mallen was provided merely with the conclusory statement that the agency had determined, in the language of § 8(g), that his continued service or participation in the "conduct of the affairs of the Bank may pose a threat to the interests of the Bank's depositors or may threaten to impair public confidence in the Bank." (J. App., 19). This procedure comports with the FDIC's Rules of Procedure concerning the sufficiency of the Notice of Suspension. 12 C.F.R. § 308.57. Accordingly, prior to the commencement of the administrative proceeding, the agency is not required to inform Mallen of the facts supporting this conclusion. It is on this basis that Mallen is charged with the burden of going forward to disprove the agency's conclusions.

This Court has previously stated that a tenured public employee is entitled to oral or written notice of the charges against him, an explanation of the employer's evidence, and opportunity to present his side of the story. *Cleveland Board of Education* v. *Laudermill, et al.*, 470 U.S. at 546, citing *Arnett* v. *Kennedy*, 416 U.S. at 170-171 (opinion of Powell, J.); *Brock* v. *Roadway Express, Inc.*, 95 L.Ed.2d at 251, (failure to provide employer with the factual information upon which the agency based an order for employee's reinstatement was a denial of due pro-

cess).[18] It is upon the backdrop of the pretermination procedures provided to Mallen, which were nonexistent, that this Court must analyze the minimum sufficiency of post-termination procedures. The inevitable relationship of these two procedures has been previously acknowledged by the Court, as has the necessity of analyzing one in the context of the other. *Cleveland Board of Education* v. *Laudermill*, 470 U.S. at 545 and opinion of Marshall, J., concurring in part and concurring in the judgment at 551.

Since Mallen is expected to undertake the burden of going forward to disprove the FDIC's conclusions, without notice of the facts upon which those conclusions are based, it appears imperative that he be guaranteed the right not only to present his own witnesses, but also to cross examine FDIC witnesses, if for no other reason than to ascertain the factual predicate for the FDIC's decision. Although it is acknowledged that an analysis of the constitutional requirements of due process must proceed on a case by case basis, this Court has previously recognized that, under some circumstances, denying an opportunity to confront or cross examine adverse witnesses is constitutionally fatal. *Goldberg* v. *Kelly*, 397 U.S. at 268; *Cleveland Board of Education* v. *Laudermill*, 470 U.S. at 548, (Marshall, J. concurring in part and concurring in the judgment). As previously indicated, one of the factors relevant to the Court in reaching its conclusion is the existence and nature of pretermination procedures. Another is the existence of factual disputes or the necessary relationship between factual issues and

[18] Mallen believes that the agency's failure to notify him of the facts supporting his suspension renders the FDIC's procedures constitutionally defective. However, this issue was not specifically raised before the District Court.

legal conclusions. *Goldberg* v. *Kelly*, 397 U.S. at 268, n.15. It appears clear that any determination as to the danger posed by Mallen's continued presence in the Bank must rest in significant part upon factual issues.[19] This Court has previously stated that "[i]n almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses." Id. at 269, (citations omitted). This would seem to be especially true when the facts supporting the government's case remain undisclosed at the inception of the hearing.

> Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends upon findings of fact, the evidence used to prove the government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue . . . we have formalized these protections in the requirements of confrontation and cross examination. They have ancient roots. They find expression in the Sixth Amendment . . . this court has been zealous to protect these rights from erosion. It has spoken out not only in criminal cases . . . but also in all types of cases where administrative . . . actions were under scrutiny. Id. at 270, citing *Green* v. *McElroy*, 360 U.S. 474, 496-497 (1959).

Similarly, in *Mathews* v. *Eldridge*, where the Court found that a pre-termination hearing on disability benefits

[19] Had the FDIC afforded Mallen a timely hearing, he was prepared to present evidence in his defense that his indictment had received extensive publicity not only in Kanawha, but in the State of Iowa. He was further prepared to demonstrate that the Bank had experienced no unusual deposit run-off and that the community's reaction was generally one of support and confidence in his abilities and integrity.

need not be an evidentiary one, significant reliance was placed on the nature of the agency's pre-termination procedures. These included the policy of allowing the disability recipient's representative full access to all information relied upon by the state, including medical assessments of the worker's physical or mental condition, and all supporting documentation including x-rays, clinical or laboratory tests, etc. Further, and prior to termination, the agency provided the recipient with written notice of its conclusions, the reasons therefore, and the summary of the evidence considered to be most relevant. Opportunity was then afforded the recipient to submit additional evidence or arguments and therefore to "mold" his argument in response to the precise issues which the decision-maker regards as crucial. 424 U.S. at 344-346. A post-termination evidentiary hearing was also provided, as was ultimate judicial review. Id at 339. The conclusion in *Mathews* v. *Eldridge* notwithstanding, the reasoning of the Court in that case supports Mallen's consitutional entitlement to present his own witnesses and to cross examine the agency. In fact, given Mallen's lack of knowledge of the facts supporting the agency's charges and his burden of going forward, it is perhaps most crucial that he have an opportunity to call FDIC witnesses in order to ascertain the factual predicate for the FDIC's decision. Without this ability and given his burden of going forward any hearing is meaningless, as Mallen has no idea whatsoever what facts he is required to rebut.

The FDIC suggests that since neither the statutes nor its own regulations preclude the opportunity to call and cross examine witnesses, the statute is not constitutionally defective. However, the statute cannot be read in a vacuum. Since the same statute and implementing reg-

ulations do not require notice of the facts supporting the FDIC's allegations, and the FDIC's practice, as clearly demonstrated here, is to provide none, the opportunity to call and cross-examine witnesses is crucial. Mallen does not believe that the minimal requirements of due process are accorded if made merely discretionary.

Finally, the FDIC contends that the existence of a transcript developed as part of the FDIC's § 8(e) proceeding against Mallen justifies dispensing with the need for oral testimony in the 8(g) hearing. (App. Br., 7, n.4). Mallen contends that this argument is totally without merit. In the first place, this proceeding predated Mallen's indictment by approximately seven months, and was totally unrelated to any potential danger to the Bank as a result of Mallen's presence in the Bank after indictment. As previously indicated, the hearing did involve, *inter alia*, the allegations contained in the indictment, but the FDIC's Rules of Procedure state that the truth or falsity of these allegations are irrelevant to the suspension hearing. 12 C.F.R. § 308.56(a)(2). Additionally, the § 8(e) hearing was never completed, as the administrative law judge recused himself shortly after Mallen began his defense. Accordingly, the vast majority of the § 8(e) transcript represents the FDIC's case-in-chief and its use against Mallen in the suspension hearing, even if relevant, without an opportunity to call witnesses in rebuttal, would pose other constitutional problems beyond the scope of this proceeding. This is perhaps why, as the FDIC correctly observes, "The [district] court did not mention the lengthy evidentiary hearing that was the reason why FDIC Regional Counsel had suggested that in this instance an oral hearing might be unnecessary." (App. Br., 33, n.24).

CONCLUSION

12 USC § 1818(g) violates the Due Process clause of the United States Constitution (a) by failing to provide a post-suspension hearing at a meaningful time and (b) by failing to guarantee the right to call and cross examine witnesses. Accordingly, the judgment of the District Court should be affirmed in all respects.

Respectfully submitted,

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OCTOBER TERM, 1987

FEDERAL DEPOSIT INSURANCE CORPORATION, APPELLANT

v.

JAMES E. MALLEN, ET AL.

ON APPEAL FROM THE UNITED DISTRICT COURT FOR THE NORTHERN DISTRICT OF IOWA

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In the Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-82

FEDERAL DEPOSIT INSURANCE CORPORATION, APPELLANT

v.

JAMES E. MALLEN, ET AL.

ON APPEAL FROM THE UNITED DISTRICT COURT FOR THE NORTHERN DISTRICT OF IOWA

REPLY BRIEF FOR THE APPELLANT

Unlike the horse trainer in *Barry* v. *Barchi*, 443 U.S. 55 (1979), who had no meaningful opportunity to challenge his suspension, appellee Mallen had two. He had a criminal trial—a swift and fair opportunity to put the government to its proof of the indictment on which his suspension rested—but the government successfully bore its burden and he was convicted. And under 12 U.S.C. 1818(g)(3) he had a swift and fair opportunity to persuade the FDIC that—notwithstanding the indictment—his return to the bank would not "pose a threat to the interests of the bank's depositors or threaten to impair public confidence in the bank"; instead of using that opportunity, he brought this suit alleging that Section 1818(g)(3) is unconstitutional on its face. His arguments in this Court do not, however, support that conclusion.

1. Congress deliberately chose to afford a banking agency up to 30 days to commence a Section 1818(g)(3) hearing and up to 60 additional days to reach a decision. The parties agree that whether those outside limits are

constitutionally permissible depends, under *Mathews* v. *Eldridge*, 424 U.S. 319 (1976), on a weighing of the individual's interest, the governmental interest, and the likelihood of error. We argued in our opening brief that an examination of those factors, in the context of a Section 1818(g)(3) hearing for an indicted bank officer, demonstrates that those limits are plainly permissible. Nothing in appellee's brief refutes that showing.

a. Throughout his brief (*e.g.*, Br. 7, 8, 10, 19), appellee treats the fact of an indictment—the existence of a neutral determination that there is probable cause to believe that the bank officer has committed a felony involving dishonesty or breach of trust—as if it were merely the *occasion* for the agency to look at whether he should be suspended. But Congress plainly intended that the indictment would itself be the primary *basis*, and in appropriate cases the sole basis, for the initial determination that the officer's continued service may pose a threat to depositors or public confidence; upon indictment such a determination was expected to be "virtually routine."[1] To

[1] S. Rep. 1482, 89th Cong., 2d Sess. 2 (1966). Appellee argues incorrectly (Br. 9) that the district court in *Feinberg* v. *FDIC*, 420 F. Supp. 109 (D.D.C. 1976), rejected the argument that Congress intended the suspension to be "virtually routine." The *Feinberg* court rejected only the contention that Section 1818(g) conferred no discretion at all and therefore created no issue for a hearing (420 F. Supp. at 117 n.19).

The 1966 statute reviewed in *Feinberg* provided for no hearing at all under subsection (g). The passage quoted by appellee (Br. 9) from the Senate Report, stressing the importance of "thorough consideration" of suspensions and removals, concerned neither hearings nor the substantive basis for suspension; nor did it concern the FDIC. The Senate Committee was explaining why, since the Comptroller of the Currency, who oversees national banks, is a single individual, the 1966 amendments provided that suspension and removal of officers of national banks should be decided by a collegial body, the Board of

be sure, the statute then allows the officer an opportunity to show that despite the indictment his continued service will *not* pose such a threat, but absent such a showing the agency's decision to suspend may rest on the indictment alone, a point appellee implicitly accepts when he concedes (*id.* at 5-6) that no pre-suspension process is required and (*id.* at 22 & n.17) that the officer has the burden of proving that he does not pose a threat.

Contrary to appellee's apparent assumption (Br. 8), the FDIC's regulation (12 C.F.R. 308.56(a)(2)) stating that its "Board shall not consider the guilt or innocence of the [indicted] individual" does not mean that the indictment merely triggers an agency inquiry in which the grand jury's finding of probable cause is to be ignored. While the word "consider" sometimes means "pay attention to," in this context it obviously means "evaluate." The point of the regulation is that the Board is not to assess the criminal case but to take the grand jury's action as given. A finding of probable cause is of course constitutionally sufficient to support a suspension from a position of trust at a federally insured bank while guilt is being determined by the appropriate criminal processes. See *Baker* v. *McCollan*, 443 U.S. 137, 142-143 (1979) (consequences of indictment); *Gerstein* v. *Pugh*, 420 U.S. 103 (1975).

The assessment of the adequacy of the Section 1818(g)(3) hearing, in light of the three *Mathews* factors, must therefore take the fact of indictment into account. What the bank officer has at stake at the hearing is not, as appellee would wish (Br. 8-9), an otherwise absolute right to his job, but the opportunity to establish that he should

Governors of the Federal Reserve System, with the Comptroller sitting as a voting member (an arrangement which was modified in 1978 (see Financial Institutions Regulatory and Interest Rate Control Act of 1978, Pub. L. No. 95-630, § 107(d)(1), 92 Stat. 3658)). See S. Rep. 1482, *supra*, at 9.

be allowed to hold it, pending completion of the criminal process, because despite the indictment he poses no threat to the bank or its depositors. What the public has at stake is the welfare of the bank and its depositors in the hands of an individual as to whom there *is* probable cause to believe he committed a felony involving dishonesty or breach of trust. And the *role* of the Section 1818(g)(3) hearing in choosing between these interests is a very limited one: the primary processes that initially, and then finally, determine whether the officer may hold office are the indictment process and then the criminal trial; the only issue at the Section 1818(g)(3) hearing is whether the officer can show that he poses no threat in the interim.

b. Appellee is of course correct (Br. 19 & n.12) that the Section 1818(g)(3) hearing and decision will often take much less than 90 days, particularly in cases where the officer makes a minimal showing and the outcome is unfavorable to him. (Here, the hearing would have commenced 19—not 30—days after appellee's request (J.S. App. 4a), and we will never know how long a decision would have taken.) But the relevant case, for purposes of assessing the statute on its face, is the case where, despite a serious criminal charge, the officer hopes by making a substantial showing to demonstrate the absence of a threat. It was entirely appropriate for Congress to allow the FDIC staff (which may be wholly unfamiliar with the matter) up to 30 days to prepare to meet that showing, and the hearing officer and Board another 60 days to exercise due care before returning an indicted officer to his bank.

c. Finally, there is obviously no merit to the argument (Br. 15-16) that the otherwise appropriate outside deadlines imposed by Congress on the Section 1818(g)(3) process are unconstitutional because in some cases a criminal trial would be completed in even less time. The

suspended officer simply has two ways of bringing his suspension to an end—by acquittal and by success in a Section 1818(g)(3) review—and the fact that the former will sometimes pretermit the latter does not make it inadequate.[2]

2. Appellee makes almost no attempt to defend, and cites no authority for, the district court's conclusion that the Constitution requires that a suspended bank officer be given the opportunity to present live witnesses. His arguments with respect to process at the hearing are devoted largely to matters not mentioned below, and they are in any event without merit.

a. Preliminarily, we note that the "procedure" section of appellee's brief (at 22-27), like the "timing" section, wholly ignores the significance of the indictment. It is not true that "pretermination procedures * * * were nonexistent" (Br. 24); or that appellee was "without notice of the facts upon which [the FDIC's] conclusions [were] based" (*ibid.*). The grand jury process is an ancient and honorable "pre-termination procedure," and appellee was fully aware of the indictment and its contents.[3] The adequacy of the processes at the hearing should not be analyzed as if the suspension were an otherwise baseless act wholly dependent on the showing made at the hearing, or

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[2] Appellee suggests (Br. 21) that a conviction pretermits the Section 1818(g) hearing in the same way an acquittal does, because 12 U.S.C. 1829 imposes an independent bar on service after conviction. As appellee admits (Br. 16 n.11), however, a suspension under Section 1818(g) has consequences broader than the Section 1829 bar. Mallen would, despite his conviction, have received a hearing on his suspension had the district court not intervened.

[3] In this instance, the officer was also very familiar with other FDIC objections to his conduct, as a result of a prior proceeding that produced 1,400 pages of sworn testimony. See Gov't Br. 7 n.4.

as if an indicted officer had no knowledge of the grounds for this suspension.

b. The statute gives a suspended bank officer the opportunity to appear in person or through counsel, to present written materials and oral argument, and in the agency's (here, the hearing officer's) discretion to present oral testimony. As we explain in our opening brief (Gov't Br. 32-33), neither logic nor authority supports the proposition that the lack of an absolute right to present oral testimony denies a bank officer in this situation a meaningful opportunity to be heard.

c. Finally, appellee makes several procedural arguments that were *not* the basis of the decision below:[4] that it is improper to require him to provide a list of witnesses or to impose time limits on their testimony; that he should have the right to call FDIC witnesses; and that it is improper to deny him the right to cross-examine witnesses presented by the FDIC staff. None of these claims has any merit whatever. The requirement of a witness list and the authorization to the hearing officer to impose time limits on testimony are entirely standard agency procedures in the interests of good order,[5] and appellee offers not a whisper of argument or authority to invalidate these regulations. The absence of any general right to call members of the FDIC staff as witnesses is consistent with the fact that the purpose of the hearing is not to review the actions of FDIC staff but to give the indicted officer an opportunity to establish that he does not pose a threat to

[4] Appellee raised none of these arguments in his pleadings or at the hearing before the district court.

[5] *E.g.*, 7 C.F.R. 1.140(a)(1)(iv) (Department of Agriculture; witness lists); 34 C.F.R. 31.6(d)(1)(ii) (Department of Education; witness lists); 10 C.F.R. 110.105(a)(7) (Nuclear Regulatory Commission; time limits); 13 C.F.R. 315.27(c)(4) (Department of Commerce; time limits).

the bank. And the cross-examination argument is based on a false premise: if the FDIC staff does offer testimony, "[e]ach party shall have the opportunity to cross-examine any witness presented by an opposing party." 12 C.F.R 308.61(e).

For these reasons and those stated in our opening brief, the judgment of the district court should be reversed.

Respectfully submitted.

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